

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1928.

No. 4760.

542

HOWARD SUTHERLAND, AS ALIEN PROPERTY
CUSTODIAN, AND ~~FRANK WHITE~~, AS TREAS-
URER OF THE UNITED STATES, APPELLANTS,

*H. Theod
Tate*

vs.

BEHN, MEYER & COMPANY, LIMITED.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED MAY 2, 1928.

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W. A. T. W.

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Court of Appeals of the District of Columbia

No. 4760.

HOWARD SUTHERLAND, &c., et al., Appellants,

vs.

BEHN, MEYER & COMPANY, LIMITED.

a Supreme Court of the District of Columbia.

Equity. No. 40361.

BEHN, MEYER & COMPANY, LIMITED, Plaintiff,

against

THOMAS W. MILLER, as Alien Property Custodian of the
United States, and Frank White, as Treasurer of the
United States, Defendants.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1

Bill of Complaint.

Filed July 28, 1922.

In the Supreme Court of the District of Columbia, Holding
an Equity Court.

Equity. No. 40361.

BEHN, MEYER & COMPANY, LIMITED, Plaintiff,

against

THOMAS W. MILLER, as Alien Property Custodian of the
United States, and Frank White, as Treasurer of the
United States, Defendants.

To the Supreme Court of the District of Columbia:

The plaintiff, Behn, Meyer & Company, Limited, respectfully represents that:

I. Since December, 1905, the plaintiff has been and at all times hereinafter mentioned was a corporation incorporated and organized in and existing under the laws of the Straits Settlements, a crown colony of the United Kingdom of Great Britain and Ireland.

II. The defendant Thomas W. Miller is a resident of the District of Columbia and is now and since in or about March, 1921, has been the duly appointed, qualified and acting Alien Property Custodian of the United States and is sued herein as the incumbent of said office. The said defendant is the successor in said office of one Francis P. Garvan, who in turn was the successor in said office of one A. Mitchell Palmer, the first incumbent of said office, and said defendant
as such officer is possessed of the rights, property and
2 interest owned or held by, and subject to the obligations, duties and liabilities imposed upon, his said predecessors in said office.

III. The defendant Frank White is a resident of the District of Columbia and is now and since in or about April, 1921, has been the duly appointed, qualified and acting Treasurer of the United States and is sued herein as the incumbent of said office.

IV. This is a suit of a civil nature brought under the laws of the United States, namely, the act of Congress known as the Trading with the Enemy Act, approved by the President October 6, 1917, and the acts amendatory thereto, and the executive orders and actions proclaimed and done in alleged conformity therewith, and also under and in conformity with the general jurisdiction and powers of this Court; and at the date of the commencement thereof eighteen months had not elapsed after the "end of the war," as prescribed and defined in said acts of Congress.

V. The plaintiff is not now and never has been an "enemy" or "ally of enemy" as defined in said acts of Congress, and it has never been proclaimed by the President as included within said terms or either of them. It is not and never has been resident within, or incorporated within, or done business within any part of the territory (including that occupied by the military and naval forces) of any nation with which the United States is or at any time since April 6, 1917, was at war. It is not and never has been resident within, or incorporated within, or done business within any part of the territory (including that occupied by the military and naval forces) of any nation which now is or at any time since April 6, 1917, was
3 an ally of any nation with which the United States now is or at any time since said date was at war.

VI. Heretofore and prior to February, 1918, the plaintiff had branches of, and was engaged in, business in the Straits Settlements, in British North Borneo, in Java, in Sumatra, in Siam, in India and in four places in the Philippine Islands, namely: Manila, Cebu, Ilo-Ilo and Zamboanga. At said branches in the Philippine Islands it then carried on a general trading and merchandising business which was under the supervision, management and control of one J. M. Menzi, a citizen of the Swiss Republic and a stockholder in the plaintiff corporation.

VII. The plaintiff's business and branches in the Philippine Islands were in February, 1918, and for a considerable period prior thereto had been valuable and profitable going concerns. In said month of February, 1918, the Alien Property Custodian of the United States, one of the predecessors of the defendant Miller herein, purporting to act

under and by virtue of said act of Congress known as the Trading with the Enemy Act, caused to be seized, conveyed, transferred, assigned, delivered and paid over to him by said Menzi all the moneys, property and assets of said branches of the plaintiff's business in the Philippine Islands, and by agents and representatives said Alien Property Custodian took over and possessed himself of the same. Thereafter he, his agents and representatives, again purporting to act under the authority of said act of Congress, liquidated the said branches, caused the accounts thereof to be sold or collected and caused the property and assets theretof to be sold or otherwise disposed of, and took over the proceeds or avails thereof thus realized upon such liquidation. The exact amount so received and taken over as aforesaid by the Alien Property Custodian is unknown to the plaintiff, but it has been informed and believes that it exceeds half a million dollars. The said moneys are now in the possession, custody and control of the defendants herein, who are wrongfully withholding the same from the plaintiff and are and have been receiving the income therefrom.

VIII. The plaintiff charges that said taking over and seizure of its said property and assets of and at its said branches in the Philippine Islands by, and the said conveyance, transfer, assignment, delivery and payment thereof to, the Alien Property Custodian, were illegal, wrongful and void in that the plaintiff was not an "enemy" or "ally of enemy" whose property or assets could be lawfully taken over or seized by, or conveyed, transferred, assigned, delivered or paid to, the Alien Property Custodian, within the true meaning and intent of said terms in said acts of Congress; that, on the contrary, it was a corporation incorporated within the Straits Settlements (which is territory of a nation associated with the United States in the prosecution of the recent war), and was not resident within or doing business within the territory of any nation with which the United States was at war or of any ally of such nation; that said assets and property so taken over, seized, conveyed, transferred, assigned, delivered and paid as aforesaid were owned at the time of such taking, seizure, conveyance, transfer, assignment, delivery and payment by

a subject of a nation other than Germany, Austria, Hungary or Austria-Hungary, namely, by the plaintiff, a subject of the British Empire, the minority of whose capital stock was not owned, held or possessed by any citizen, subject or resident of any enemy nation or of any ally thereof; that no due and legal determination was ever made under said Trading with the Enemy Act that the plaintiff was an enemy or ally of enemy, or that said property and assets were enemy property and assets, and that no due and lawful demand for said property and assets, as required by law, was ever made or served upon the plaintiff.

IX. Heretofore and subsequent to said seizure, taking over, conveyance, transfer, assignment, delivery and payment as aforesaid of said property and assets by the Alien Property Custodian, the plaintiff, as required by section 9 of said Trading with the Enemy Act, duly filed with the Alien Property Custodian a sworn notice of its claim to said property and assets and to the proceeds and avails thereof realized by the Alien Property Custodian upon the liquidation as aforesaid of the plaintiff's Philippine branches.

X. The Straits Settlements hereinabove referred to are a part of the British Empire and territory of the United Kingdom of Great Britain and Ireland, which is a nation associated with the United States in the prosecution of the recent war, and said nation in like cases to this extends reciprocal rights to citizens of the United States.

Wherefore the plaintiff prays that a writ of subpoena issue herein directed to the said defendants, Thomas W. Miller, Alien Property Custodian, and Frank White, Treasurer of the United States, commanding them and each of them to appear herein and answer this bill of complaint, but not under oath, the answer under oath of each of them being hereby specifically waived, and that said defendants and each of them be directed (1) to deliver to plaintiff all of said property and assets seized, taken over, conveyed, transferred, assigned, delivered or paid to the then Alien Property Custodian or the defendant Alien Property Custodian or the defendant Treasurer of the United States, as aforesaid, and now in the possession, custody or control of the above named defend-

ants or either of them; (2) to pay over to the plaintiff the proceeds and avails of the sale or other disposition of any or all of said property and assets, together with all interest or income accrued or realized thereon; and (3) to account to the plaintiff for said property and assets, interest and income, and (4) that the plaintiff have such other and further relief as to the Court may seem just and proper.

BEHN, MEYER & COMPANY, LIMITED,
Plaintiff,

By EMIL W. MARTENS,
Attorney-in-fact.

HOWE, SWAYZE & BRADLEY,
Solicitors for Plaintiff,
Riggs Building, 1426 G Street,
Washington, D. C.

WALTER BRUCE HOWE,
Of Counsel for Plaintiff.

STATE OF NEW YORK,
County of New York, ss:

Emil W. Martens, being duly sworn, says: My address is No. 43 White Street, New York City. I am a director of Behn, Meyer & Company, Limited, the plaintiff in the above entitled action, and I am also its attorney in fact. I have read the foregoing bill of complaint and know the contents thereof, and the same is true to the best of my knowledge, information and belief. The reason this verification is not made by the plaintiff is that the plaintiff is a body corporate and no person authorized to act for it, other than as attorney and attorney-in-fact, is within the United States.

EMIL W. MARTENS.

Sworn to before me this 27th day of July, 1922.

[NOTARIAL SEAL.] BERNARD HERSHKOPF,
Notary Public, New York County, N. Y.

Stipulation Relative to Amendment.

Filed March 23, 1923.

* * * * *

It is hereby stipulated and agreed by and between Messrs. Howe, Swayze & Bradley, attorneys for the plaintiff, and Peyton Gordon, Esquire, Attorney of the United States in and for the District of Columbia, attorney for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, that at the hearing upon the motion to dismiss the bill of complaint in this cause, counsel for the plaintiff amended the bill of complaint by inserting in paragraph numbered VIII thereof, before the words "the minority", the word "only", so that the said paragraph of the bill of complaint read as follows:

"The plaintiff charges that said taking over and seizure of its said property and assets of and at its said branches in the Philippine Islands by, and the said conveyance, transfer, assignment, delivery and payment thereof to, the Alien Property Custodian, were illegal, wrongful and void in that the plaintiff was not an 'enemy' or 'ally of
S enemy' whose property or assets could be lawfully taken over or seized by, or conveyed, transferred, assigned, delivered or paid to, the Alien Property Custodian, within the true meaning and intent of said terms in said acts of Congress; that, on the contrary, it was a corporation incorporated within the Straits Settlements (which is territory of a nation associated with the United States in the prosecution of the recent war), and was not resident within or doing business within the territory of any nation with which the United States was at war or of any ally of such nation: that said assets and property so taken over, seized, conveyed, transferred, assigned, delivered and paid as aforesaid were owned at the time of such taking, seizure, conveyance, transfer, assignment, delivery and payment by a subject of a nation other than Germany, Austria, Hungary or Austria-Hungary, namely, by the plaintiff, a subject of the British Empire, only the minority of whose

capital stock was not owned, held or possessed by any citizen, subject or resident of any enemy nation or of any ally thereof; that no due and legal determination was ever made under said Trading with the Enemy Act that the plaintiff was an enemy or ally of enemy, or that said property and assets were enemy property and assets, and that no due and lawful demand for said property and assets, as required by law, was ever made or served upon the plaintiff."

HOWE, SWAYZE & BRADLEY,
Attorneys for Plaintiff.

PEYTON GORDON,
*Attorney of the United States in and for
the District of Columbia, Attorney for
Thomas W. Miller, as Alien Property
Custodian, and Frank White, as Treas-
urer of the United States.*

Answer to the Amended Bill of Complaint.

Filed April 18, 1925.

* * * * *

Now come the defendants, Frederick C. Hicks, as Alien Property Custodian, and Frank White, as Treasurer of the United States, separately and severally answering the amended bill of complaint, and for their separate and several answers say:

9 (1) Upon information and belief that these defendants admit that prior to the year 1914 there existed in the Straits Settlements, a crown colony of the United Kingdom of Great Britain and Ireland, a corporation organized and incorporated under the laws of the said Straits Settlements known as Behn, Meyer & Company, Ltd.

Further answering said paragraph these defendants say that they are without knowledge as to whether or not the said corporation existed in its corporate entity subsequent to the year 1914, and therefore demand strict proof thereof.

Further answering said paragraph these defendants deny that this suit has been instituted by and with the authority of Behn, Meyer & Company, Ltd.

Further answering said paragraph these defendants, upon information and belief deny that Emil W. Martens, who purports to institute this suit on behalf of Behn, Meyer & Company, Ltd., as its attorney-in-fact, was ever authorized or given any authority whatsoever by Behn, Meyer & Company, Ltd., or by any person acting on behalf of Behn, Meyer & Company, Ltd., to institute this suit.

(2) They admit the averments of paragraph numbered II of the amended bill of complaint.

(3) They admit the averments of paragraph numbered III of the amended bill of complaint.

(4) The averments of paragraph numbered IV of the amended bill of complaint are conclusions of law which these defendants are not required to answer.

(5) They are without knowledge as to the averments of paragraph numbered V of the amended bill of complaint, and therefore demand strict proof thereof.

10 (6) Answering the averments of paragraph numbered VI of the amended bill of complaint, these defendants upon information admit that prior to 1914 a corporation known as Behn, Meyer & Company, Ltd. was engaged in business in the Philippine Islands, but these defendants are without knowledge as to the other separate and several allegations of the said paragraph, and therefore demand strict proof thereof.

Further answering said paragraph these defendants deny that this suit has been instituted by and with the consent, or upon the authorization of Behn, Myer & Company, Ltd.

(7) Answering the averments of paragraph numbered VII of the amended bill of complaint, these defendants say that subsequent to the enactment of the Trading with the Enemy Act and prior to the time that the defendant Hicks, as Alien Property Custodian, assumed office, the Alien Property Custodian seized certain money and other property in the Philippine Islands which stood in the name and was held for the benefit of an organization known as Behn, Meyer & Company, Ltd., which purported to be a corporation organized and incorporated under the laws of the Straits Settlements. Thereafter the said property was liquidated by the Alien Property Custodian and the proceeds of the sale thereof paid in to the Treasury of the

United States, and there is now held in the Treasury of the United States a sum somewhat less than \$300,000, which was seized as the property of the said Behn, Meyer & Company, Ltd. Should this Court determine that the alleged plaintiff in this case is entitled to any of the said money these defendants will make a true and accurate accounting of all the said money.

11 Further answering the said paragraph these defendants say that they are without knowledge as to whether or not any of the said money or other property seized as aforesaid was at the time of seizure the money and other property of Behn, Meyer & Company, Ltd., and these defendants demand strict proof of such fact.

Further answering said paragraph these defendants deny that the organization known as Behn, Meyer & Company, Ltd., which purported to be a corporation organized under the laws of the Straits Settlements, has authorized the prosecution of this suit.

(8) They are without knowledge as to the averments of paragraph numbered VIII of the amended bill of complaint, and therefore demand strict proof thereof.

(9) Answering the averments of paragraph numbered IX of the amended bill of complaint these defendants deny that Behn, Meyer & Company Ltd., the alleged plaintiff in this case, ever filed a notice of claim under Section 9 of the Trading with the Enemy Act with the Alien Property Custodian in which it claimed any property or money of any kind or character whatsoever.

Further answering said paragraph these defendants say that on or about the 14th day of December, 1921, there was filed with the Alien Property Custodian and certain notice of claim by one O. M. H. Sieleken and one E. W. Martens, who purported to file the said claim as directors and attorney-in-fact respectively, of Behn, Myer & Company, Ltd.

Further answering said paragraph these defendants deny that O. M. H. Sieleken was at the time the said notice of claim was filed, a director of Behn, Meyer & Company, Ltd., and these defendants further deny that at the time the said notice of claim was filed the said E. W. Martens was a director and attorney-in-fact of Behn, Meyer & Company, Ltd., or held either of such offices or positions.

(10) Upon information and belief that these defendants admit that the Straits Settlements are a part of the British Empire and territory of the United Kingdom of Great Britain and Ireland, which was a nation associated with the United States in the prosecution of the war.

Further answering the said paragraph these defendants are without knowledge as to whether or not the United Kingdom of Great Britain and Ireland extends reciprocal rights to citizens of the United States in like cases.

(11) Upon information and belief these defendants deny that Emil W. Martens is or was at the time of the filing of the amended bill of complaint in this suit, attorney-in-fact for Behn, Meyer & Company, Ltd.

For a separate and several affirmative defense to the amended bill of complaint these defendants, separately and severally, say:

(12) That on or about the 4th day of August, 1914, war became flagrant between the United Kingdom of Great Britain and Ireland and the various dominions, possessions and colonies thereof on the one part and the Imperial German Government on the other, and that said war continued until the ratification by the British Empire of the so-called Treaty of Versailles in or about the year 1919.

(13) That at the time of the said outbreak of war between the British Empire and the Imperial German Government, there existed in the Straits Settlements a corporation organized under the laws of the said Straits Settlements known as Behn, Meyer & Company, Ltd.

(14) Upon information and belief that shortly subsequent to the outbreak of the said war in 1914, Arthur Young, governor and commander-in-chief of the colony of the Straits Settlements and its dependencies, certified that in his opinion Behn, Meyer & Company, Ltd. was an enemy company as defined in "The alien enemies (winding up) ordinance 1914."

(15) Upon information and belief that on or about the 2nd day of January 1915, Sir Arthur Henderson Young, governor and commander-in-chief of the Straits Settlements and their dependencies, in pursuance and in the exercise of power and authority vested in him by law, ap-

pointed one William Harvey MacGregor of Singapore, to be liquidator to wind up the affairs of the trade carried on by said Behn, Meyer & Company, Ltd., and upon information and belief that said William Harvey MacGregor thereupon assumed control of the affairs of Behn, Meyer & Company, Ltd. and proceeded with the liquidation of its affairs in accordance with the law of the Straits Settlements.

(16) Upon information and belief that on or about the 16th day of February 1924, Sir Laurence Nunns Guillemard, governor and commander-in-chief of the Straits Settlements and their dependencies in pursuance of the power and authority vested in him by law, revoked the aforementioned appointment of W. H. MacGregor of Singapore, as liquidator, to wind up the affairs of the trade carried on in the Straits Settlements of Behn, Meyer & Company, Ltd., and appointed Evatt & Company of Singapore, to be

liquidators from the said date to wind up the affairs
14 of the trade carried on in the Straits Settlements by the said Behn, Meyers & Company, Ltd., and that the said Messrs. Evatts & Company assumed control of the affairs of the said Behn, Meyers & Company, Ltd., and proceeded to liquidate the said company pursuant to law.

(17) Upon information and belief that on or about the 12th day of November 1924, the said Sir Laurence Nunns Guillemard, governor and commander-in-chief of the Straits Settlements and their dependencies, in pursuance of the power and authority vested in him by law, revoked the aforementioned appointment of Messrs. Evatts & Company, and appointed Mr. Charles Vernon Bailer and Mr. Sydney Whitaker, of Singapore, to be liquidators to wind up the affairs of the trade carried on in the Straits Settlements by Behn, Meyer & Company, Ltd., and granted to either of the said persons power to act alone in the said winding up for any of the powers or purposes exercisable by a liquidator under the alien enemies (winding up) ordinance 1914, or any of the amending ordinances thereto.

(18) Upon information and belief that thereupon the said Charles Vernon Bailer and Sydney Whitaker assumed control of the affairs of the said Behn, Meyer & Company, Ltd., and proceeded with the liquidation and winding up thereof.

(19) Upon information and belief that pursuant to the laws of the Straits Settlements the said liquidators upon appointment acquired complete control of all the affairs and property of the said corporation, and that all business and all acts done on behalf of the said corporation were and are subject to the approval of the said liquidator or liquidators.

15 (20) Upon information and belief that at the time of the outbreak of war between the British Empire and the Imperial German Government, each of the directors of the said corporation were citizens and subjects of the Imperial German Government, and that subsequent to the outbreak of the war each of said persons were present and resided in Germany at all times subsequent to August 4, 1914, and upon information and belief that the said persons continued to reside in Germany during the period of the war between the British Empire and the Imperial German Government and during the entire period of the war between the United States of America and the Imperial German Government.

(21) Upon information and belief these defendants say that amongst others who were directors of Behn, Meyer & Company, Ltd. at the time of the outbreak of war between the British Empire and the Imperial German Government were O. M. H. Sielcken, E. L. Lorenz Meyer, Ad. Laspey, and Emil Martens.

(22) Upon information and belief these defendants say that by reason of the outbreak of war between the British Empire and the Imperial German Government and the residence of the said persons within Germany, they thereby ceased by operation of law, to be directors in the said corporation, and it became impossible for them to act as such directors.

(23) Upon information and belief that at some period during the year 1921, the exact date of which is unknown to these defendants, said O. M. H. Sielcken, E. L. Lorenz Meyer, Ad. Laspey, Emil W. Martens, and another whose name is unknown to these defendants and all of whom were then resident within Germany, met at Hamburg, a city in Germany, and purported to hold what they termed to be a meeting of the Board of Directors of the said Behn, Meyer

16 & Company, Ltd., and what they termed to be a meeting of the Consulting Committee of the said Behn, Meyer & Company.

(24) Upon information and belief that the said persons then present in Hamburg, Germany, purporting to act as a Board of Directors of the said Behn, Meyer & Company, Ltd., purported to grant to the said Emil W. Martens authority to institute proceedings in the United States of America against the Alien Property Custodian and the Treasurer of the United States, to secure the return to them of all the property of Behn, Meyer & Company, Ltd., which had been seized by the Alien Property Custodian, defendant in this suit, upon the theory that they constituted a Board of Directors, and/or a consulting committee of Behn, Meyer & Company, Ltd.

(25) Upon information and belief that said Emil W. Martens instituted the present proceedings pursuant to the so-called power of attorney granted to him at the said meeting in Hamburg, Germany.

(26) Upon information and belief that the said power of attorney is ineffective insofar as the said Behn, Meyer & Company, Ltd. is concerned and is null and void, and conferred upon the said Emil W. Mertens no authority of any kind, character or description, either to institute the present proceedings or to act on behalf of the Behn, Meyer & Company, Ltd.

Wherefore having fully answered the amended bill of complaint, these defendants pray that they be dismissed with their costs in this behalf expended, and for such other and further relief to which in the premises they may be justly entitled.

F. C. HICKS,

Alien Property Custodian.

FRANK WHITE,

Treasurer of the United States.

17 DISTRICT OF COLUMBIA, ss:

Frederick C. Hicks, being first duly sworn, upon oath deposes and says that he is the Alien Property Custodian: that he has read the foregoing answer by him subscribed and knows the contents thereof: that the matters and things

therein stated as of his personal knowledge are true and those stated as upon information and belief, he believes to be true.

F. C. HICKS.

Subscribed and sworn to before me this 11th day of April, 1925.

[NOTARIAL SEAL.]

SOPHIE D. HILLMAN,

Notary Public, D. C.

DISTRICT OF COLUMBIA, ss:

Frank White, being first duly sworn, upon oath deposes and says that he is Treasurer of the United States of America; that he has read the foregoing answer by him subscribed and knows the contents thereof; that the matters and things therein stated as of his personal knowledge are true and those stated as upon information and belief, he believes to be true.

FRANK WHITE.

Subscribed and sworn to before me this 11th day of April, 1925.

[NOTARIAL SEAL.]

SAMUEL H. MARKS,

Notary Public, D. C.

18

Motion to Reopen

Filed November 1, 1927.

Now comes Behn, Meyer & Company, Ltd., the plaintiff in Equity No. 45881, by its attorneys and moves that the above entitled causes be reopened to allow the taking of further testimony, and as grounds for this motion said plaintiff shows as follows:

1. The decision announced by the Court at the conclusion of argument in the above entitled causes was based in part on certain findings and presumptions as follows:

(a) The Court found that the certificates for the shares of stock of Lapse, Meyer and Witthoeft in Behn, Meyer & Company, Ltd., totaling 9,759 shares preference stock and 19,254 shares of ordinary stock, had been in the hands of the liquidators of Behn, Meyer & Company, Ltd., and the Court

assumed that this was because these stockholders had turned over these certificates to the authorities in the Straits Settlements by virtue of the provisions of the Treaty of Versailles, (typewritten record page 1465).

(b) The Court found as a fact that the liquidator subsequently turned over these certificates to the shareholders, (r. 1151, 1152).

(c) The Court held that the testimony did not justify a finding of fact that the Custodian consented to the return of these certificates, (r. 1154, 1165).

(d) The Court presumed, however, that the return of these certificates by the liquidator was with the consent of the Custodian and that the Custodian acted with the advice and consent of the Governor in Council, (r. 1465).

(e) The Court found that the return of these certificates released the charge on said certificates pursuant to the following provision of the Straits Settlements law:

“that any particular property rights or interests so charged may at any time be released by the Custodian acting under the general direction of the Governor in Council from the charge so created,” (r. 1466).

2. At the conclusion of the statement of the Court's decision in the case, Mr. Doing stated:

“If your Honor please, may I ask that if the case is to turn upon the effect of these certificates being in the hands of these Germans that I have leave to reopen the case to prove how they came to so hold. There is no evidence in this case as to how they came by them. The papers show nothing. I submit that the case should not go off on the merits in that way without some evidence upon the subject at first hand in the case. It is not fair to anybody concerned, I am sure.”

Upon objection then made by Mr. Kresel the Court stated:

“I cannot at this time at any rate entertain any such motion. I do not want to suggest any further litigation before me on this case, but if such a motion is made it should be made on affidavits.”

3. Counsel for the plaintiff in Equity 45881 immediately endeavored to ascertain the exact facts on the points stated

above. Considerable delay ensued however, owing to the fact that Messrs. Clarke and Mundell were at first both on their respective voyages to the Straits Settlements where they arrived about April 1st, 1927. After the latter had returned to the Straits Settlements considerable time necessarily elapsed in the exchange of correspondence in order to develop the facts accurately. Each exchange of letters between the Straits Settlements and New York consumes approximately ten weeks without any intervening delay involved in obtaining information. Counsel for the plaintiff in equity 45881 did not ascertain the full facts until October 27, 1927. These full facts were finally obtained through an interchange of cablegrams containing inquiries and information based upon questions raised by letter. The full facts as thus developed are as follows: The Certificates in question were not delivered to the authorities of the Straits Settlements pursuant to the Treaty of Versailles, but were found by the liquidators in three envelopes among the property of Behn, Meyer & Company in the Straits Settlements when the liquidators took charge of such property, and were thereafter held by the liquidators and later by the Custodian of Enemy Property. On February 13, 1925, a Mr. Overbeck, representing the three German stockholders in question, called on Mr. Whitaker, one of the then liquidators, and requested permission to remove the company's share register and preference and ordinary share certificate books. This request was communicated to the Custodian of Enemy Property by the liquidator in a letter dated February 13, 1925, as follows:

Singapore, 13th February, 1925.

"The Custodian of Enemy Property,
"Singapore.

"SIR:

"Behn, Meyer & Co., Ltd. (in Liquidation).

"Mr. Overbeck informs us that he is desirous of taking possession of the following books on behalf of the
21 shareholders of the above Company:

Share Register,

Preference Share Certificate Book,

Ordinary Share Certificate Book.

“He states that he has discussed this matter with you, and that you have given your consent provided that we do not require them ourselves in connection with the work we have in hand. The books are not required by us, and we do not consider that there can be any objection. On receipt of a letter from you instructing us to do so, we will hand these books to Mr. Overbeck.

“We have the honor to be, Sir,

“Your obedient servants,

“Sd.

S. WHITAKER.

“P. S.—The Share certificates which we understand are in your possession will also not be required by us.”

The Custodian replied to the liquidators as follows:

“The Treasury,

“Singapore, 14th February, 1925.

“GENTLEMEN :

Behn, Meyer & Co. Ltd. (in Liquidation).

“I have the honour to acknowledge the receipt of your letter dated the 13th instant and to inform you that I have no objection to your handing over to Mr. Overbeck the three books mentioned in your letter.

“2. I forward herewith the following share Certificates for shares in Messrs. Behn, Meyer & Co. Ltd. which may also be handed over to Mr. Overbeck on his granting you a receipt for them as representatives of Messrs. Witthoefft, Lorenz Meyer and Laspe, as per their letter dated 15th January 1925 to the Custodian of Enemy Property, and as attorney of the Soerabaya Company:

“E. L. Lorenz Meyer 6418 Ordinary shares and 3253 Preference shares.

“Ad. Laspe 6418 Ordinary shares and 3253 Preference shares.

“F. H. Witthoefft 6418 Ordinary shares and 3253 Preference shares.

“I have the honour to be, Sir,

22 “Your obedient servant,

(“Sd.)

M. B. SHELLEY,

“Custodian of Enemy Property.

“Messrs. Evatt & Co.”

Thereafter February 14, 1925, Messrs. Evatt & Company, the liquidators, turned over the books and certificates in question to Mr. Overbeck and received a receipt as follows:

“Evatt & Co.

“Singapore, 14th February, 1925.

“Behn, Meyer & Co., Ltd. (in Liquidation).

“Received from Messrs. Evatt & Co., on behalf of the Shareholders of the above Company one Preference Share Certificate Book, one Ordinary Share Certificate Book, one Register of Members, one Parcel of Share Certificates as follows:

E. L. Lorenz Meyer 6,418 Ordinary shares and 3,253 Preference shares.

Ad. Laspe 6,418 Ordinary shares and 3,253 Preference shares.

F. H. Witthoefft 6418 Ordinary shares and 3253 Preference shares.

together with Transfers attached in favour of E. L. Lorenz Meyer, A. F. H. Laspe and F. H. Witthoefft of Hamburg for 6,251 shares.

“For and on behalf of E. L. Lorenz Meyer, Ad. Laspe, F. H. Witthoefft, by Their Attorneys, N. V. Behn, Meyer & Co. H. MIJ.

“(Sd.)

H. OVERBECK,
Director.”

23 These acts of the Custodian and the liquidator did not release the shares from the charge. In sending these certificates to the liquidator to be turned over to the stockholders the Custodian did not act under the general direction of the Governor in Council. The Governor in Council had issued no specific directions authorizing the Custodian to send these certificates to the liquidator to be turned over to the stockholders, nor had the Governor in Council issued any specific directions authorizing the Custodian to release these shares from the charge. The Gov-

ernor in Council had not issued any general directions under the authority of which the charge could be released by these acts of the Custodian, nor in fact had the Governor in Council issued general directions providing any method whereby the Custodian might release these shares from the charge. The act of the Custodian was wholly unauthorized.

4. The materiality of these facts to the decision announced by the court is as follows:

(a) The stock certificates were not in fact turned over to the authorities of the Straits Settlements pursuant to the Treaty of Versailles, as was assumed by the Court.

(b) The liquidators did in fact turn over the certificates to the German stockholders, as found by the Court.

(b) The Custodian did in fact consent to such turning over, as assumed by the Court, but as to which there was no evidence in the case.

(d) This act of the Custodian, however, was not done under the direction of the Governor in Council as
24 assumed by the Court but was a wholly unauthorized act.

(c) This act of the Custodian did not release the charge on the shares in question.

(5) There is attached hereto the affidavit of Mr. Frederic R. Coudert, of New York City, the chief counsel for the plaintiff in Equity 45881, as to the facts on which this motion is based. If these cases are reopened, counsel for the plaintiff in Equity No. 45881 except to prove these facts by competent evidence. These facts were not in the knowledge of counsel for the plaintiff in Equity No. 45881 when the case was tried and submitted, and have only been fully developed through a letter received from the Straits Settlements October 7, 1927, and subsequent cablegrams from Coudert Brothers to Sisson & Delay dated October 14, 1927 and October 24, 1927, and from Sisson and Delay to Coudert Brothers dated October 22, 1927 and October 26, 1927. True and complete copies of all said cablegrams are hereto annexed marked respectively Exhibits "A", "B", "C" and "D".

J. HARRY COVINGTON,
SPENCER GORDON,

Attorneys for Plaintiff in Equity No. 45881.

STATE OF NEW YORK,

County of New York, ss:

I, Frederic R. Coudert, do solemnly swear that I have read the foregoing motion to reopen, that the statements of fact contained in said motion are true and complete
25 to the best of my knowledge and belief; that the information on which said statements are made was derived from cables and letters and enclosures received from the firm of Sisson & Delay in the Straits Settlements and particularly from a letter from that firm which was received in my office October 7, 1927; that on October 14, 1927 I cabled Sisson & Delay for certain additional information and received a reply October 24, 1927; on October 24, 1927 I again cabled Sisson & Delay and received their final reply on October 27, 1927; true and complete copies of the said cablegrams are annexed as exhibits to the foregoing motion to reopen; that until that time I did not feel that we had sufficient knowledge of the exact facts in reference to the holding of the certificates by the Straits Settlements authorities and the turning over of the same to the German stockholders to warrant a motion to reopen the case, but I now believe that the attached motion contains a statement of all of the essential facts relating to said transactions; that if said case is reopened for the purpose of taking further testimony I expect to prove said facts by competent testimony; that said facts as set forth in said motion were not known to counsel for the plaintiff in Equity 45881 at the time of the trial of the case; that at the time of the trial of the case counsel for the plaintiff in Equity 45881 asked Messrs. Clarke and Mundell what the facts were in relation to the matters set forth in said motion but neither Mr. Clarke nor Mr. Mundell had exact information on the subject, and in order to get the precise information it was necessary for us to communicate with the Straits Settlements, that we have been in such communication since immediately after the argument of the case, and have endeavored to develop the facts as
26 quickly as possible.

FREDERICK R. COUDERT.

Subscribed and sworn to before me this 31st day of October, 1927.

[NOTARIAL SEAL]

THOMAS B. MORAN,
Notary Public.

Notary Public Kings County.

Kings County Clerk's No. 85.

Kings County Register's No. 8100.

New York County Clerk's No. 166.

New York County Register's No. 8208.

Queens County Clerk's No. 164.

Certificate filed in Nassau & Westchester Counties.

EXHIBIT "A."

October 14, 1927.

Mundell, Delay, Singapore:

Please cable whether Governor in Council ever issued any general directions in any case other than Behn, Myer Case under which Custodian could release any property from treaty charge stop Also confirm that quote Governor in Council unquote in clearing office legislation means executive council and not legislative council.

COUDERT.

27

EXHIBIT "B."

Western Union Cablegram.

October 22, 1927.

Received at 40 Broad Street (Central Cable Office), New York, N. Y.

N. O. HN 55 PW Singapore 82 1/50 CLT Treduec
NYK.

Coudert Bros.,

2 Rector St.,

Governor gave general directions to release first property not exceeding one thousand pounds of enemy subjects excepted from repatriation for colony showing good cause secondly property of German consular officers thirdly proceeds sale of personal and household effects not exceeding five hundred pounds see colonial office circular despatches

seventh August nineteenth twenty eleventh October nineteen-
twenty and despatch twoninety of Seventeenth May nine-
teen twentyone stop Governor in Council means executive
council see Straits laws interpretation ordinance number
one three one section two a writing.

DELAY.

MM22.

28

EXHIBIT "C."

October 24, 1927.

Mundell, Delay, Singapore:

Are making motion reopen case stop assume Governor
never issued any general or special directions other than
those mentioned your cable and consequently that Custodian
unauthorized release Behn, Myer share from charge
stop Please cable verification immediately.

COUDERT.

EXHIBIT "D."

Postal Telegraph Cablegram.

Oct. 26, 1927. 2217.

HO1 65 Singapore 92.

CLT Treduec New York:

Reference our telegram twentysecond October for first
word substitute Secretary of State Stop Directions therein
mentioned were only indications of policy which this Gov-
ernment adopted stop Property held by Custodian became
subject to peace treaty charge only on thirty-first August,
1921 by order of Governor in Council under Trading
29 with Enemy Amendment ordinance 1915 and there-
after no general directions for release of property
from the charge were given in any case whatever stop
Custodian had no authority release Behn, Meyer share cer-
tificates stop This answers your telegram twenty-four Octo-
ber.

DELAY.

Messrs. Isidor J. Kresel, Bernard Hershkopf, and Howe, Swayze & Bradley, attorneys for plaintiffs in Equity No. 40361, and Mr. Dean Hill Stanley, attorney for defendants:

Please take notice that the foregoing motion will be presented to Mr. Chief Justice McCoy for consideration on Friday, November 4, 1927, at the opening of Court or as soon thereafter as counsel can be heard.

J. HARRY COVINGTON,
SPENCER GORDON,
Attorneys for Plaintiffs in Equity 45881.

Received a copy of the foregoing motion and affidavit November 1, 1927.

HOWE, HILL & BRADLEY,
Attorneys for Plaintiffs in Equity 40361.
DEAN HILL STANLEY,
Attorney for Defendants.

30 *Affidavit in Opposition to Motion to Reopen.*

Filed November 19, 1927.

* * * * *

STATE OF NEW YORK,

County of New York, ss:

Isidor J. Kresel, being duly sworn, deposes and says:

I. I am one of the attorneys for the above named plaintiff in the cause designated above as Equity No. 40361, which was heretofore tried before Mr. Chief Justice McCoy of this Court together with the cause designated above as Equity No. 45881. I am familiar with the proceedings heretofore had herein, and I make this affidavit in opposition to the motion of the attorneys for the plaintiff in Equity No. 45881 for leave to reopen the said causes for the purpose of taking further testimony therein.

II. The above named causes have long been pending in this Court. In December of last year I was advised that I would have to be ready to proceed to trial therein, and the causes were thereupon set down for trial in January

of this year. Under circumstances of considerable inconvenience to my client and myself, I prepared to try this case in January. The trial began on January 25, 1927, and was concluded February 3, 1927. All applications for adjournment made by me were strongly opposed by my adversaries, and particularly by the moving party herein; and, at every turn of the case, it was impressed upon the Court and me that no delay for any reason would be tolerated. A night session became necessary and was held. I all but wholly lost the benefit of the testimony of Sir

31 T. Willes Chitty, who was under pressing necessity to return to England; and, as it turned out, I did lose the benefit of his help and testimony with reference to the "vesting orders" made by the Straits Settlements Governor, to such an extent that it seemed necessary to counsel for the liquidators to agree that I should thereafter have the right to file a certificate of Sir T. Willes Chitty in that relation. The cases were subsequently argued on February 23 and 26, 1927, when the Court announced its decision in favor of my client. An application was then addressed to the Court for leave to reopen the cases, and, upon my objection, it was denied. I shall hereafter revert to the occurrences upon the argument of the cases; but, for the present, I desire to submit that in these cases, even more than usual, should the Court require of the moving party the utmost diligence. A party who has hustled his adversary to the utmost, quite regardless of the consequences to his adversary's case, is hardly entitled to have his own laches and shortcomings overlooked or condoned.

III. The "vesting orders" were made November 13, 1926. That was long after the pleadings in my case were framed and four months after the bill of complaint was verified in the other case. There was nothing in the pleadings to suggest that any vesting orders would be relied upon. The only issue tendered was that, under the Straits Settlements ordinances, the liquidators appointed in the Straits Settlements with respect to the trade of Behn, Meyer & Company, Ltd., were, not merely local liquidators entitled to take only the company's assets in the colony, but universal liquidators entitled to all the property of the company everywhere in the world. That was the only

issue which I believed we would be called upon to
32 meet at the trial.

And that was, in the beginning at least, the sole reliance of the liquidators in cause No. 45881. Although the liquidators' counsel had the vesting orders in their possession all through the trial, they never breathed a word about them in their opening address or until they offered them on January 31, 1927, after Sir T. Willes Chitty had sailed for England.

The liquidators' counsel evidently believed that they had a safe gamble without recourse to the vesting orders. They had a prominent lawyer of the Straits Settlements, Mr. Mundell, who was here to testify that, under the law of his colony, the liquidators were universal liquidators entitled to take all of the company's property wherever situated. They were doubtless aware that I would have no lawyer from the Straits Settlements to offer in opposition. They did not know that I had a letter written by Mundell himself in which he had given the then liquidator a wholly contrary opinion; and that I had other letters showing that the Attorney General of the Straits Settlements, its Registrar of Companies and other public officials had also given like opinions contrary to that which Mundell was to testify in this case.

The liquidators' counsel also deemed his position upon that score impregnable because he had the carefully cooked up ruling of a judge in the Straits Settlements in this very case, made in response to an *ex parte* application by Mundell. In the opening of the liquidators' counsel, that ruling
33 was declared to be conclusive evidence to show that the Straits Settlements liquidators were universal liquidators. It was not foreseen by them that, in the end, that ruling would not even be permitted in evidence. Nor, apparently, was it realized by the liquidators' counsel that, at the end of the case, Mundell's theories of the universal character of the liquidators would be so discredited and destroyed that it would no longer be possible even to argue the point, and that they would, finally, have to abandon it altogether.

I mention these matters in order that the Court may realize how completely the liquidators have changed front in this litigation, and to the end that the Court may realize

how improper and unjust it is that they should now be allowed to reopen the case and to mend their hold once more.

IV. I offered in evidence the certificates for the shares of stock of Behn, Meyer & Company, Ltd., owned by Messrs. Laspe, Witthoefft and Lorenz-Meyer and the stock certificate book and the share register of the company on the very first day of the trial, January 25, 1927. Mundell and the liquidator Clarke were present when that occurred. They knew at that very time, that those documents had been turned over to Mr. Overbeck, the agent of Messrs. Laspe, Witthoefft and Lorenz-Meyer, by the liquidators with the consent of the Alien Property Custodian. Mundell virtually so declared when I cross-examined him on February 2, 1927 (stenographer's minutes, pp. 810-11). The next day he sought to modify his admission and declared that he had only information on that score and not knowledge (*id.* pp. 1004-5, 1015-20). He testified that he had caused a search for the stock certificates and the stock register to be made in the Straits Settlements before he sailed (*id.* p. 1005).

34 Clearly he knew, before he came to the United States, that those documents were important; particularly must he have realized their importance in view of the fact that he knew of the vesting orders, made in November preceding the trial, which he was then bringing to the United States.

Whether he knew of his own knowledge, or by information from others, that the share certificates and the register had been surrendered to Overbeck, the agent of Messrs. Laspe, Witthoefft and Lorenz-Meyer, it was equally his duty then—before he ever came to this country to aid in the trial of these cases—to learn all the facts pertaining thereto. He was not a mere expert on foreign law; he was the liquidators' lawyer and the attorney in fact of the Straits Settlements Alien Property Custodian. (See Exhibit 27 of the liquidators.) If he failed to do that even after his search revealed that the share certificates and the stock register were not in the colony, it was either a wilful or negligent omission; and the consequence thereof should fall upon the liquidators and not upon my client.

V. During the trial, my associate, Mr. Hershkopf, and I asked Mr. Clarke, the liquidator, in the court room whether he knew how the share certificates and the books in question came to be turned over to Mr. Overbeck, and he professed complete ignorance on the subject. After the trial was over, but before the cause came on for argument, I received from abroad a copy of a letter written on December 7, 1926, by Mr. C. V. Bailey, who is Mr. Clarke's co-liquidator, to Mr. Overbeck. The original of that letter has since come into my hands. It reads as follows:

35

"7th December, 1926.

H. Overbeck, Esq.,

N. V. Behn Meyer Handels Maatschappij,
Batavia.

DEAR MR. OVERBECK:

With reference to the cable which Mr. Clarke sent to you at Manila, requesting you to return the Register of Members and Directors and Share Certificates taken by you on the 14th February, 1925, I wish to assure you that the words 'taken by you' were not intended in any offensive manner. The telegram was despatched the day on which Mr. Clarke got married, and a few hours only before his departure for America, and he was really too rushed to be able to choose his words carefully. The cable intended to refer to the documents delivered to you, to which action I find, from correspondence in our office, the Custodian of Enemy Property in Singapore agreed.

I shall be glad to hear from you that this removes any misunderstanding which may have existed.

Yours sincerely,

C. V. BAILEY."

As the Court will observe, this letter shows (1) that, so far from being in ignorance concerning the share certificates and book in question, Clarke knew all about them; (2) that a few hours before he left for this country to be present at the trial of these cases, he had himself cabled Mr. Overbeck to return the very shares and the very register, and (3) that correspondence in the office of the liquidators, that is, in Clarke's own office, told all about it.

I tried to find Clarke, both in Washington and New York, in order to subpoena him to attend before this Court on February 23, 1927, and explain, under oath, how—in the face of that letter and his cable therein referred to—he could tell me and Mr. Hershkopf that he knew nothing at all about the share certificates and the register given to

Mr. Overbeck. But Clarke had then left the United States. If Clarke had not told me that he knew nothing about the matter, I would have sworn him as a witness and proved the facts by him. But he saw fit to convey to me the impression he did. He then deemed it in the interest of the liquidators and the Straits Settlements authorities to suppress the fact. Obviously the liquidators then elected to take their chance. I submit that, now that the liquidators have lost, they may not complain.

VI. Upon the argument on February 23, 1927, I laid the copy of the above letter before the Court and explained why I thought it should be admitted. The liquidators objected and the Court sustained their objection and the letter was excluded. (See the stenographer's minutes, pp. 1144-58.) In excluding that letter, the Court then said to me (*id.* p. 1156): "Now all that I could say is that if you want to make a motion to re-open the case and take further testimony I will entertain it." I answered (*id.*): "I would not ask your Honor to re-open the case for that purpose. I do not want to delay the disposition of the case. It would mean a delay of months."

The liquidators' counsel were, at that very moment, fully advised of my contention concerning the effect of the return of the share certificates and the register. I had previously stated my views on that score and my purpose (*id.* p. 1146). If they wanted to meet me more fully on that subject, and desired further proofs in that relation, then, if ever, was the time to apply to the Court to re-open the cases. But, nevertheless, when I declined to ask that relief myself, the liquidators' counsel stood by in silence, perfectly willing to take the benefit of the exclusion of the letter and my failure to apply for a re-opening of the cases, obviously because they thought that there was nothing in my point. Now that the Court has held otherwise, they regret their gamble.

I submit that they and their clients then deliberately accepted the situation and may not now complain.

VII. That that is true, is clear when one recalls what occurred in this Court after the Court had announced its opinion in my favor. The following colloquy took place (stenographer's minutes, pp. 1467-8):

Mr. Doing: If your Honor please, may I ask that if the case is to turn upon the effect of these certificates being in the hands of these Germans, that I have leave to reopen the case to prove how they came to be so held?

There is no evidence in this case as to how they came by them. The papers say nothing. I submit that case should not go off on the merits in that way without some evidence upon the subject at first hand in the case. It is not fair to anybody concerned, I am sure.

Mr. Kresel: This is a late day, your Honor, to speak of the fairness of this matter. I have kept my temper under great temptation to speak my mind in reference to these liquidators, particularly Mr. Clarke, who, I have believed, knew just how these stock certificates had been handed over to us, that he consented to it, that that consent is in writing, and that when I spoke to Mr. Clarke in this court room he denied knowing anything about it. And yet, according to the letter which I showed your Honor a copy of and which I undertook to produce the original of, when he was on his way over here for the trial of this case he knew all about the return, because he sent a telegram to Mr. Overbeck demanding the return of the certificates.

"As I say, it is too late now to ask to reopen the case to prove what the facts are. The facts are as Mr. Mundell said, before he had a change of heart, that these stock certificates were returned to us by the liquidator, and that he thought it was done with the knowledge and consent of the custodian. Then he came back and said, 'While it is true that that is what I think, I want you to know that I am not saying it upon my own knowledge; I was told so.' I think that is sufficient."

It is impossible, I submit, to read the foregoing remarks of Mr. Doing, one of the counsel for the liquidators, without realizing that the reason he wanted to reopen the case was merely because the Court had treated as of weight evidence which he had, until then, been sure would be held worthless. His disappointment in that respect is hardly a sufficient reason for re-opening the cases.

VIII. Under the Straits Settlements Clearing Office (Amendment) Ordinance, 1921, it is a crime, punishable by fine and imprisonment, for any person wrongfully to surrender up property subject to the treaty charge. Notwithstanding that, it is now the purpose of the liquidators to attempt to show that both the liquidators and the Straits Settlements Custodian of Enemy Property were guilty of that crime.

Before the Court may permit that, it is submitted that there should be the strongest and clearest proof. The Court will, however, look in vain for any affidavit of any person which measures up to that standard. There is no affidavit of the Governor, nor of the Custodian. The affidavit of Mr. Coudert is mere hearsay. It relies on unsworn cablegrams received from the witness Mundell. In view of the manner and extent to which Mundell was discredited in this case when he gave sworn testimony, it is submitted that his mere unsworn declarations are worthless, particularly when their purport and effect are to fix criminal responsibility upon his own client, the former liquidator Whitaker, and the Straits Settlements Custodian of Enemy Property.

IX. The facts, which the liquidators' counsel now say were discovered by them only in October of this year, were or should have been, I submit, in the knowledge of the liquidators, the Straits Settlements Custodian, Mundell and his firm, and Clarke, long before the trial of this suit
39 commenced. The information which counsel claim only recently to have obtained by cable, could have been obtained any time by cabling Mr. Bailey, Clarke's co-liquidator, as is apparent from Bailey's letter to Overbeck quoted above.

When I offered the stock certificates and the share register in evidence on the very first day of the trial, January 25, 1927, Mundell, who had searched for those very documents before he left Singapore, must have wondered how we had those documents. As Mr. Bailey's letter shows, Clarke knew all about that, and could have told Mundell and the other counsel for the liquidators. In any event, however, in January, 1927, at the latest, the liquidators were put upon their inquiry in that regard. If they did not pursue it then, it was their neglect or laches.

X. Five matters are set forth in the motion which the liquidators would desire to develop on the re-hearing, if one were granted.

(a) First, it is stated that "the stock certificates were not in fact turned over to the authorities of the Straits Settlements pursuant to the Treaty of Versailles, as was assumed by the Court."

That circumstance is wholly immaterial. It is of no consequence how the stock certificates were turned over to the Straits Settlements authorities. The important fact is that, irrespective of how they came to get them, the Straits Settlements authorities voluntarily relinquished them to their owners.

The true facts in respect of the circumstance in question, were, moreover, made clear at the trial. Thus, on Mundell's cross-examination it was brought out that, when he
40 had previously referred to subdivision 10 of the annex to Article 298 of the Treaty of Versailles, he had not meant to imply that the stock certificates were in Germany when this Treaty was made (Stenographer's minutes, pp. 809 to 810). It was thus apparent that they could not come within that provision of the Treaty which required the surrender, within six months after the treaty was made, by Germany to the Allies of certain specified securities.

The inapplicability of that Treaty provision was again made clear by me to the court at the conclusion of the case (see stenographer's minutes, pp. 1464 to 1465), where I said:

"Your Honor will recall, Mr. Mundell testified that (that provision) had no application here, because that was confined to the six months period after the signing of the treaty and referred only to stock certificates in Germany. These were not in Germany."

There is, it is submitted, no useful purpose in seeking proof on this score: the exact facts were before the Court, and the whole subject is irrelevant.

(b) The second matter referred to in the moving papers is that "the liquidators did in fact turn over the certificates to the German stockholders, as found by the Court." That is true: it appears in the record: it was found by the Court and no re-hearing is necessary for that.

(c) The third matter referred to in the moving papers is that "the Custodian did in fact consent to such turning over, as assumed by the Court." That may all be conceded. It does not help the moving parties; it but strengthens the case for my client, and it is no ground for re-opening the case.

41 (d) The fourth matter referred to in the moving papers is that "this act of the Custodian * * * was not done under the direction of the Governor in council." If that be so, it was, we submit, inexcusable negligence for the moving party not to have adduced that proof upon the trial, and it is now too late to permit it. The liquidators knew that the stock certificates had been permitted by the Straits Settlements authorities to go out of the Straits Settlements back to their owners. They knew that that spelled relinquishment of the Treaty charge. If they were going to claim the contrary, if they were going to lay the vesting orders before the court and claim anything under them, it was their obvious duty to come to trial armed with whatever proof was necessary to show that the treaty charge had not in fact been validly relinquished. They and their counsel, however, deliberately elected not to bother about that proof, which was always open to them and matter of record in Singapore. That may have been a mistake of judgment, but it cannot be remedied now. They may not mend their hold after decision.

Again, as has already been noted, this claim that the Custodian surrendered the stock certificates without authority, in effect charges him and the liquidator with crime. There is no proof before the court sufficient, either in character or quantum, to support such a charge or to warrant the court in such an inference. Every consideration of law and comity, we submit, requires the court to uphold the regularity and legality of the official action of such high public officials as the Straits Settlements Custodian and liquidator.

42 (e) The final matter referred to in the moving papers is that "this act of the Custodian did not release the charge on the shares in question." That is merely an unsupported inference or conclusion of law of

the moving party; it is manifestly no proper ground for re-opening the case.

XI. I earnestly submit that the motion to re-open the cases should be denied. It is tainted with inexcusable laches; it is nothing but a belated effort of the liquidators to mend their hold; it is another attempt by Mundell and Clarke to thwart justice, their prior efforts to mislead the Court having failed, and it is unfair.

ISIDOR J. KRESEL.

Sworn to before me this 16th day of November, 1927.

[NOTARIAL SEAL.]

LORETTO T. CONROY,

Notary Public, Kings County.

Clerk's No. 598. Register's No. 9223.

Cert. filed in N. Y. & Nassau Cos.

N. Y. Co. Clk's No. 433. Reg. No. 9324.

Commission expires March 30, 1929.

Filed January 24, 1928.

* * * * *

This cause came on to be heard at this term and thereupon, upon consideration thereof, it is by the Court this 24th day of January, 1928,

Adjudged, ordered, and decreed that the Alien Property Custodian and/or the Treasurer of the United States pay to Emil W. Martens, as attorney in fact for the plaintiff, Behn, Meyer & Co. Ltd., the money held by the Alien Property Custodian and/or the Treasurer of the United States, in trusts Nos. 50219, 50235, 50236, and 50238, after deducting therefrom all necessary and lawful expenses incurred by the Alien Property Custodian in the administration and protection of said trusts, and it appearing unto the Court that there have accrued in the Treasury of the United States certain earnings upon funds held in the Treasury of the United States under the provisions of the Trading with the Enemy Act, and that the plaintiff herein is entitled to a portion of said earnings in the amount of \$50,788.43, minus lawful expenses in the amount of \$677.17, or a total of \$50,111.26, it is further,

Adjudged, ordered and decreed that the Treasurer of the United States pay to the said Emil W. Martens, as attorney in fact for Behn, Meyer & Co. Ltd., the sum of \$50,111.26, the same being the proportionate share of the plaintiff in earnings upon moneys held in the Treasury of the United States under the provisions of the Trading With the Enemy Act.

WALTER I. McCOY,
Chief Justice.

I consent to the above as to form.
DEAN HILL STANLEY,
Attorney for Defendants.

44 From the foregoing decree Howard Sutherland as Alien Property Custodian and Frank White as Treasurer of the United States, the defendants in this cause, note an appeal in open Court to the Court of Appeals of the District of Columbia.

WALTER I. McCOY,
Chief Justice.

Assignment of Errors.

Filed February 11, 1928.

* * * * *

Now come the defendants, Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States, by their attorney, Peyton Gordon, Esq., attorney of the United States in and for the District of Columbia, and file the following assignment of errors to the decision and decree of the Court upon which they will rely upon their appeal in this case:

(1) That the Court erred in adjudging, ordering and decreeing that the Alien Property Custodian, and/or the Treasurer of the United States, pay to Emil W. Martens, as attorney-in-fact for the plaintiff, Behn, Meyer & Company, Ltd., the money held by the Alien Property Custodian and/or the Treasurer of the United States, in trusts Nos. 50219, 50235, 50236, and 50238, after deducting therefrom all necessary and lawful expenses incurred by the Alien

Property Custodian in the administration and protection of said trusts, and in further adjudging, ordering and decreeing that the plaintiff herein is entitled to the sum of \$50,111.26, representing the proceeds of a portion of
45 certain earnings accrued upon funds held in the Treasury of the United States under the provisions of the Trading with the Enemy Act.

(2) That the Court erred in adjudging, ordering and decreeing that the Treasurer of the United States pay to Emil W. Martens, as attorney-in-fact for Behn, Meyer & Company, Ltd., the sum of \$50,111.26.

(3) That the Court erred in not adjudging, ordering and decreeing that the plaintiff is not entitled to recover from the Alien Property Custodian and/or the Treasurer of the United States any money or other property of any kind, character or description.

(4) That the Court erred in deciding, holding, adjudging, ordering and decreeing that Emil Martens is or was attorney-in-fact for Behn, Meyer & Company, Ltd.

(5) That the Court erred in not adjudging, ordering and decreeing that Emil Martens was without authority to institute this suit on behalf of Behn, Meyer & Company, Ltd.

(6) That the Court erred in admitting into evidence over the objections and exceptions of the defendants on the ground that the same were immaterial, irrelevant, and incompetent, Exhibits Behn, Meyer & Company, Ltd., Nos. 14 to 17, inclusive, and Nos. 19 to 31, inclusive.

(7) That the Court erred in admitting into evidence over the objections and exceptions of the defendants on the ground that it did not appear that the persons signing said document, which purported to be a power of attorney from Behn, Meyer & Company, Ltd. to Emil W. Martens, were authorized by Behn, Meyer & Company, Ltd. to execute the said power of attorney, Exhibit Behn, Meyer & Company, Ltd. No. 18.

46 (8) That the Court erred in not adjudging, ordering and decreeing that the claim herein is made on behalf of the enemy stockholders of Behn, Meyer & Company, Ltd., that the suit herein was being prosecuted on behalf of said enemy stockholders, and that the benefits sought to be obtained by said suit would accrue directly to the

enemy stockholders of said Behn, Meyer & Company, Ltd. and not to Behn, Meyer & Company, Ltd., a corporation organized under the laws of the Straits Settlements.

(9) That the Court erred in not adjudging, ordering, and decreeing that there was no evidence to show that the Straits Settlements, a Crown colony of the United Kingdom of Great Britain and Ireland, in like case, extends reciprocal rights to citizens of the United States.

(10) That the Court erred in not adjudging, ordering and decreeing that the evidence in the case showed that the Straits Settlements, a Crown colony of the United Kingdom of Great Britain and Ireland, does not in like case extend reciprocal rights to citizens of the United States.

(11) That the Court erred in not adjudging, ordering, and decreeing that the plaintiff herein was not entitled to institute a suit under Section 9 of the Trading with the Enemy Act as amended, because it does not appear that the Straits Settlements, a Crown colony of the United Kingdom of Great Britain and Ireland, in like case extends reciprocal rights to citizens of the United States.

(12) That the Court erred in not adjudging, ordering and decreeing that it was without jurisdiction of the subject matter of this suit.

47 (13) That the Court erred in not adjudging, ordering and decreeing that the evidence showed that the plaintiff had not established a cause of action in equity under the terms and provisions of Section 9 of the Trading with the Enemy Act as amended.

(14) That the Court erred in not adjudging, ordering and decreeing that the amended bill of complaint be dismissed.

PEYTON GORDON,
*Attorney of the United States, in
and for the District of Columbia.*

Received a copy of the foregoing Assignment of Errors
this 11 day of February, 1928.

CHAS. H. BRADLEY,
Attorney for the Plaintiff.

Designation of Record.

Filed February 11, 1928.

* * * * *

The Clerk will please prepare the record on appeal in the above entitled cause, and include therein the following:

- (1) The bill of complaint filed on July 28, 1922.
- (2) Stipulation relative to the amendment of the bill of complaint filed March 23, 1923.
- (3) Answer to the amended bill of complaint filed by the defendants.
- (4) Final decree dated January 24, 1928, with notation of appeal at the foot thereof.
- (5) Assignment of Errors.
- (6) Stipulation allowing same statement of evidence in Equity 45881 and Equity 40361.
- (7) Stipulation allowing reference to Statutes in addition to printed record.
- (8) Statement of evidence with proof of service thereof upon counsel for the plaintiff.
- (9) Memorandum of filing and submission of statement of evidence, and of approval of same, and memoranda of any orders extending time or other orders in connection therewith.
- (10) This designation of record.

PEYTON GORDON,
*Attorney of the United States in
 and for the District of Columbia,
 Attorney for Defendants.*

Receipt of a copy of the foregoing Designation of Record acknowledged this 11 day of February, 1928.

CHAS. H. BRADLEY,
Attorney for the Plaintiff.

Stipulation as to Statement of Evidence.

Filed February 14, 1928.

* * * * *

It is stipulated that a statement of evidence may be filed, settled and approved in either one of the above-entitled

cases and that such statement of evidenceso filed, settled and approved may be used on the appeal in the other case with the same effect as if it had been filed in the other case and that such statement of evidence may be used in both cases without the necessity of filing a separate statement
49 of evidence in each case.

HOWE, SWAYZE & BRADLEY,
By ISIDOR J. KRESEL,
Attorneys for Plaintiff in Equity No. 40361.
COVINGTON, BURLING & RUBLEE,
Attorneys for Plaintiff in Equity No. 45881.
DEAN HILL STANLEY,
Attorney for Defendants in Both Cases.

Memoranda.

February 14, 1928.—Statement of Evidence and notice, filed.

March 2, 1928.—Time to file amendments to Statement of Evidence extended to March 21, 1928.

March 21, 1928.—Proposed amendments to Statement of Evidence, filed.

Additional Designation of Record.

Filed March 28, 1928.

* * * * *

It is stipulated between counsel for the plaintiff and defendants in the above entitled cause that in the preparation of the record on appeal there shall be included in addition to the matter heretofore designated, and the Clerk is
50 requested to include in said record, the following:

3 (a). Motion to reopen case to allow the taking of further testimony; affidavit (1) and exhibit (5) filed November 1, 1927 complete.

3 (b). Affidavit of Isidor J. Kresel filed November 19, 1927 complete.

HOWE, HILL & BRADLEY,
Attorneys for Plaintiff.
DEAN HILL STANLEY,
Attorney for Defendants.

Memorandum.

March 28, 1928.—Statement of Evidence submitted, approved and made of record.

51 *Stipulation Allowing Reference to Statutes.*

Filed March 28, 1928.

* * * * * * *

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein that the treaties, statutes orders and ordinances of Great Britain and of the British Crown Colony of the Straits Settlements which were introduced in evidence from official publications upon the trial of this suit may be referred to and quoted from in the briefs of the parties upon the appeal herein with the same force and effect as though the said treaties, statutes and ordinances and each of them were printed in full in the statement of evidence in the record on appeal herein.

Following is a list of said treaties, statutes and ordinances:

Straits Settlements.

“The Alien Enemies (Winding Up) Ordinance 1914.”
Ordinance No. XXIX, 1914.

“The Alien Enemies Winding-Up (Amendment) Ordinance 1915.”
Ordinance No. I, 1915.

“The Alien Enemies Winding-Up (Further Amendment) Ordinance 1915.”
Ordinance No. XIX, 1915.

“The Alien Enemies Winding-Up Amendment Ordinance 1916.”
Ordinance No. 16, 1916.

“The Alien Enemies Winding-Up Amendment Ordinance 1917.”
Ordinance No. 6, 1917.

52 “Consolidated Alien Enemies (Winding-Up) Ordinance.”

“Trading with the Enemy Ordinance 1914.”
Ordinance No. XXV, 1914.

“The Trading with the Enemy (Amendment) Ordinance 1915.”

Ordinance No. IV, 1915.

“The Trading with the Enemy (Further Amendment) Ordinance 1915.”

Ordinance No. X, 1915.

“The Trading with the Enemy Amendment Ordinance (No. 3) 1915.”

Ordinance No. XXX, 1915.

“The Trading with the Enemy (Amendment) Ordinance 1916.”

Ordinance No. 5, 1916.

“The Trading with the Enemy (Further Amendment) Ordinance 1916.”

Ordinance No. 15, 1916.”

“The Trading with the Enemy (Extension of Powers) Ordinance 1916.”

Ordinance No. 2, 1916.

“Alien Enemy Property Restrictions Removal Ordinance.”

Vol. 4, p. 1013, Laws of Straits Settlements, Revised Edition, 1926.

“The Clearing Office Ordinance 1920.”

Ordinance No. 18, 1920.

“The Clearing Office Amendment Ordinance 1921.”

Ordinance No. 7, 1921.

“The Clearing Office Amendment Ordinance No. II, 1921.”

Ordinance No. 22, 1921.

“The Companies Ordinance 1889.”
Ordinance No. 5, 1889.

“The Companies Ordinance 1915.”
Ordinance No. 25, 1915.

53 “The Companies Ordinance, No. 155.”
Vol. IV, p. 424, Laws of Straits Settlements, Revised Edition, 1926.

“The Companies Ordinance, 1923—Ordinance 13 of 1923.”

“The Interpretation Ordinance 1912.”
Ordinance No. 6, 1912.

“The Interpretation Ordinance, No. 131.”
Vol. III, p. 855, Laws of Straits Settlements, Revised Edition, 1926.

“Ordinance III of Ordinances of 1926.”

“Crown Straits Ordinance.”
Ordinance No. 22, Vol. I, p. 277, Laws of Straits Settlements, Revised Edition, 1926.

“The Treaty of Versailles.”

Great Britain.

“The Trading with the Enemy Act, 1914.”
Ch. 87, 4 & 5 Geo. V.

“The Trading with the Enemy Amendment Act 1914.”
Ch. 12—5—Geo. V.

“The Trading with the Enemy Amendment Act 1915.”
Ch. 79—5 & 6 Geo. V.

“The Trading with the Enemy Amendment Act 1916.”
Ch. 105—5 & 6 Geo. V.

“The Trading with the Enemy Amendment Act 1918.”
Ch. 31—8 & 9 Geo. V.

“The Treaty of Peace Act 1919.”
Ch. 33—9 & 10 Geo. V.

“Treaty of Peace Order 1919.”

“Treaty of Peace (Amendment) Order 1920.”

54 “Treaty of Peace (Amendment No. 2) Order
1920.”

“Trading with the Enemy (Custodian Direction)
Order 1921.”

“Proclamation of September 14, 1915.”

“Treaty of Peace (Amendment) Order 1921.”

“Treaty of Peace (Amendment No. 2) Order 1921.”

“Treaty of Commerce & Navigation of Germany and
England, December 2, 1924.”

Dated February 28, 1928.

COVINGTON, BURLING & RUBLEE,

Attorneys for Plaintiff in Equity No. 45881.

HOWE, HILL & BRADLEY,

Attorneys for Plaintiff in Equity No. 40361.

DEAN HILL STANLEY,

Attorney for Defendants.

55 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,

District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 54, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 40361 in Equity, wherein Behn, Meyer & Company, Limited, is Plaintiff and Thomas W. Miller, as Alien Property Custodian of the United States and Frank White, as Treasurer of the United States are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 1st day of May, 1928.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,

Clerk.

56 In the Supreme Court of the District of Columbia,
Holding an Equity Term.

Equity. No. 40361.

BEHN, MEYER & COMPANY, LTD., Plaintiff,

v.

HOWARD SUTHERLAND, Alien Property Custodian, and FRANK
WHITE, Treasurer of the United States, Defendants.

and

Equity. No. 45881.

BEHN, MEYER & COMPANY, LTD.,

v.

HOWARD SUTHERLAND, Alien Property Custodian, and FRANK
WHITE, Treasurer of the United States, Defendants.

Statement of Evidence.

57 In the Supreme Court of the District of Columbia,
Holding an Equity Term.

Equity. No. 40361.

BEHN, MEYER & COMPANY, LTD., Plaintiff,

v.

HOWARD SUTHERLAND, Alien Property Custodian, and FRANK
WHITE, Treasurer of the United States, Defendants.

and

Equity. No. 45881.

BEHN, MEYER & COMPANY, LTD., Plaintiff,

v.

HOWARD SUTHERLAND, Alien Property Custodian, and FRANK
WHITE, Treasurer of the United States, Defendants.

Statement of Evidence.

Be it remembered that the above entitled causes came on
for hearing before Mr. Chief Justice Walter I. McCoy

January 25, 1927, and thereupon the following proceedings were had.

The plaintiff in Equity No. 40361 was represented by Mr. Isidor J. Kresel and Mr. Bernard Hershkopf. The plaintiff in Equity No. 45881 was represented by Messrs. Frederic R. Coudert, Mahlon B. Doing and Spencer Gordon. The defendants in both cases were represented by Mr. Dean Hill Stanley, Special Assistant to the Attorney General.

Opening statements were made by Isidor J. Kresel
58 for the plaintiff in Equity No. 40361, Spencer Gordon
for the plaintiff in Equity No. 45881, and Dean Hill Stanley for the defendants in both cases. Counsel stated the substance of the pleadings and explained that Equity No. 40361 and Equity No. 45881 constituted two suits, each brought in the name of Behn, Meyer & Company, Ltd., which counsel had agreed to have tried together owing to the fact that the plaintiffs in both cases were attempting to recover the same funds and owing to the fact that much of the testimony in each case would be material in the other case. Mr. Kresel handed the court a form of order which counsel had agreed to as follows:

These cases came on to be heard, and it is on this — day of January, 1927, ordered as follows:

(1) That the above entitled causes be, and the same are hereby, consolidated for the purpose of trial,

(2) That testimony on behalf of the plaintiff in Equity No. 40361 will be heard first, to be followed by testimony on behalf of the plaintiff in Equity No. 45881, that thereafter there shall be testimony on behalf of the defendants in both cases, to be followed by rebuttal testimony in the same order,

(3) That either plaintiff shall have the right to specify any testimony offered by the other plaintiff and have
59 the court consider the same in support of the case of the plaintiff so specifying; that the defendants shall have the right to specify any testimony offered by either plaintiff and have the court consider the same in support of their defense in either case,

(4) That the plaintiff in each case and the defendants shall have the right to cross-examine the witnesses of the other plaintiff as to any matter adduced, and each plaintiff is to have the right to cross-examine all of the witnesses

of the defendants and all parties shall have the right of objecting to any proof offered by any of the other parties.

(5) That closing arguments shall be made in the following order (1) by plaintiff in No. 40361; (2) by plaintiff in No. 45881; (3) by defendants in both cases; (4) by plaintiff in No. 45881 and (5) by plaintiff in No. 40361.

The court stated that this proposed order might be filed as a stipulation, that it would not be necessary to sign it.

60 Subsequently in the trial of the case at the conclusion of Mr. Gordon's cross-examination of Mr. Laspe, the following occurred:

Mr. Stanley: Now, may it please the Court, I am a little in doubt as to the meaning of this stipulation here. As far as Mr. Gordon has examined the witness as to these various branches, I want to adopt his examination as my own. I do not know whether that is the course under the stipulation.

Mr. Gordon: That can be done.

The Court: These cases were consolidated for hearing. Whatever is relevant to both goes into both.

Mr. Kresel: Well, the stipulation, your Honor, is somewhat more definite. The stipulation is that each plaintiff may take advantage of any proof adduced by the other plaintiff by specifying the portions that he wants to adopt. And similarly, the defendant may take advantage of whatever is developed on either side on behalf of the plaintiffs.

The Court: Well, it all comes back to the same thing. So far as I am concerned, whatever is relevant to any issue in this case is going to be considered, whether anybody adopts it or does not.

61 The plaintiff in Equity No. 40361 put in its evidence in chief as follows:

Adolf Laspe, called as a witness on behalf of the plaintiff in Equity No. 40361, being first duly sworn, testified in substance as follows:

"I live in Hamburg, Germany. I am 68 years of age. My business is a merchant. I am a member of the firm of Arnold Otto Meyer. I am a stockholder of Behn, Meyer & Company, Ltd. and also a member of the consulting com-

mittee of that company. As a member of our firm, I had charge of and attended to the business of Behn, Meyer & Company, Ltd. and we were general agents of Behn, Meyer & Company, Ltd. I became a stockholder of Behn, Meyer & Company, Ltd. at the beginning of 1906. Behn, Meyer & Company, Ltd. was organized in the Straits Settlements at the end of 1905. Prior to the organization of Behn, Meyer & Company, Ltd. as a company or corporation, there had been a concern called Behn, Meyer & Company, which was a partnership. I was a member of that partnership. It was established in 1840. I first became connected with Behn, Meyer & Company in 1883. The nature of the business of Behn, Meyer & Company, while it was a partnership and also after it was incorporated, was that of general exporters and importers and agents for shipping companies. I personally did not have a direct connection with any part of the business in the Far East except in 1903 when I was on a visit. I stayed in Hamburg and attended to Behn, Meyer & Company's business there. I was in Singapore, Straits Settlements, with the partnership, Behn, Meyer & Company, from 1883 to 1898 before it was incorporated. I was one of the incorporators and became
 62 a stockholder upon the organization of Behn, Meyer & Company, Ltd. The amount of the capital stock of the company when it started business was \$2,500,000. It was subsequently increased to \$3,000,000. There were 10,000 preferred shares and 20,000 ordinary shares. When the European War broke out in 1914 I was a stockholder of the corporation."

At this point Mr. Kressel put in evidence a certificate from the Registrar of Companies at Singapore showing the names of persons who were stockholders of Behn, Meyer & Company, Ltd. on September 19, 1914, as follows:

<i>Preference Shares.</i>				Shares.
Ed. L. Lorenz-Meyer, Merchant,	Arnold Otto Meyer,	Hamburg.		3,253
Ad. Laspe,	"	do.		3,253
F. H. Witthoefft,	"	do.		3,253
		Behn, Meyer & Co., Ltd.,		
J. M. Menzi,	"	Manila		240
Eugen Engler,	"	Arnold Otto Meyer, Hamburg.		1
				10,000 shares.

Ordinary Shares.

Ed. L. Lorenz-Meyer, Merchant,	Arnold Otto Meyer, Hamburg.	6,418
Ad. Laspe,	do.	6,418
F. H. Witthoefft,	do.	6,418
Eugen Engler,	do.	500
	Behn, Meyer & Co., Ltd.,	
J. M. Menzi,	Manila	241
Erwin Lehrenkrauss,	do., Singapore.....	1
A. Diehn,	do.	1
R. Schubert,	do., Penang.....	1
A. Schoenberg,	do., Singapore.....	1
G. Rademacher,	do., Sourabaya.....	1

This was marked Behn, Meyer Exhibit No. 1.

63 Mr. Laspe continued his testimony as follows:

“Ed. Lorenz Lorenz-Meyer was my partner in Arnold Otto Meyer. Mr. Witthoefft was a partner in that firm. The three gentlemen who composed the firm of Arnold Otto Meyer each owned an equal number of shares in Behn, Meyer & Company, Ltd. Mr. Menzi, who owned 240 shares of preferred and 241 share- of common, was the manager of the branch firm of Behn, Meyer & Company, Ltd. in Manila. Eugen Engler, who held 1 share of preferred and 500 shares of common, had been a long time with Behn, Meyer & Company, Ltd. and was at that time a junior member of the firm of Arnold Otto Meyer in Hamburg. At the outbreak of the European War the Directors of Behn, Meyer & Company, Ltd. were Mr. Diehn, Mr. Schoenberg, Mr. Schubert, Mr. Menzi and Mr. Rademacher. Mr. Lehrenkrauss was the secretary. Each one of the directors had one share of stock. The three gentlemen who composed the firm of Arnold Otto Meyer owned between them 9,759 shares of preferred stock out of a total of 10,000 shares and owned 19,254 shares of common stock out of a total of 20,000 shares.”

Mr. Kressel then introduced in evidence certificates of stock of Behn, Meyer & Company, Ltd. which were identified by Mr. Laspe as follows:

Certificates Standing in the Name of Ed. Lorenz, Lorenz Meyer.

Certificate No. 1 for 5,330 ordinary shares.

“	“	77	“	500	“	“
“	“	51	“	420	“	“
“	“	74	“	1	“	“

Certificate No. 87 for 166 ordinary shares.

"	"	86	"	1	"	"
"	"	1	"	2,500	preferred	"
"	"	14	"	753	"	"

64 *Certificates in the Name of Adolf Laspe.*

Certificate No. 4 for 5,330 ordinary shares.

"	"	52	"	420	"	"
"	"	72	"	1	"	"
"	"	78	"	432	"	"
"	"	79	"	66	"	"
"	"	80	"	2	"	"
"	"	88	"	167	"	"
"	"	2	"	2,500	Preferred	"
"	"	15	"	753	"	"

The following certificates in the name of Franz Heinrich Witthoefft:

Certificate No. 81 for 432 ordinary shares.

"	"	82	"	67	"	"
"	"	83	"	1	"	"
"	"	7	"	5,330	"	"
"	"	53	"	420	"	"
"	"	75	"	1	"	"
"	"	89	"	167	"	"
"	"	3	"	2,500	preferred	"
"	"	16	"	753	"	"

Mr. Kresel further put in evidence stock certificate book of the ordinary shares issued by Behn, Meyer & Company, Ltd. containing the stubs of the certificates issued with notations of the dates, names and amounts, and the stock certificate book of Behn, Meyer & Company, Ltd. for preferred shares containing the stubs showing notations of these same certificates with dates, names and amounts. All of the certificates put in evidence bore dates on or before January 1, 1914. Exhibits were numbered "Exhibit Behn, Meyer & Company, Ltd., Numbers 2 to 9, inclusive.

Mr. Kresel further put in evidence the share register of Behn, Meyer & Company, Ltd., both as to preferred and common stock, as Exhibit Behn, Meyer & Co. Ltd. No. 10.

According to this share register the “balance of shares remaining” was as follows:

Preference Shares.

Ed. Lorenz Lorenz-Meyer	3,253	June 15, 1908.
Adolph Laspe	3,253	June 15, 1908.
Franz Heinrich Witthoefft	3,253	June 15, 1908.
Eugen Engler	1	June 15, 1908.
J. M. Menzi	240	September 25, 1908.

65 *Ordinary Shares.*

Ed. Lorenz Lorenz-Meyer	6,418	25-9-14.
Adolph Laspe	6,418	25-9-14.
Franz Heinrich Witthoefft	6,418	25-9-14.
Erwin Lehrenkrauss	1	April 1.
J. M. Menzi	241	25-9-14.
August Diehn	1	January 1, 1908.
Robert Schubert	1	January 1, 1908.
Eugen Engler	500	June 15, 1908.
G. Rademacher	1	January 1, 1914.
Ad. Schoenberg	1	January 1, 1914.

Mr. Kresel then put in evidence the Memorandum and Articles of Association of Behn, Meyer & Company, Ltd., as Exhibit Behn, Meyer & Company, Ltd., No. 11, the material parts of which are as follows:

66 *Memorandum and Articles of Association of Behn, Meyer & Co., Limited.*

Registered on the 11th Day of December, 1905.

67 *Singapore, Straits Settlements.*

The Companies Ordinance, 1889.

Company Limited by Shares.

Memorandum of Association of Behn, Meyer & Company, Limited.

1. The name of the Company is “Behn, Meyer and Company, Limited.”

2. The Registered Office and domicile of the Company is in Singapore, Straits Settlements.

3. The objects for which the Company is established are:

(a) To acquire and carry on the business now carried on by Behn, Meyer and Company, at Singapore, and by the Branch Houses or Agencies thereof, together with the goodwill of such business and the whole or any part of the moveable and immovable property, real and personal property, and rights held and enjoyed in connection with such business, and to undertake all or any of the liabilities thereof.

* * * * *

(c) To carry on business as General Merchants, Exporters and Importers, General Storekeepers, Wholesale and Retail Traders, Shippers, Bankers, Agents for Bankers, Shipowners, Shipping Agents, Carriers, Insurers against losses of all kinds, Commission and Insurance Agents, Estate and Property Agents, Warehousemen, Lightermen, Ship Agents, Contractors, Builders, Guarantors, Wharf and Dock Owners or Lessees, Owners or Lessees of Railways and Tramways, Owners of Mining, Planting, and other properties wherever situate, Owners or Lessees of Craft, plant and appliances for Pearl Shell seeking by diving, Planters, Miners, Dealers in Shares and Stocks, Brokers, General or Special Agents or Managers at Singapore and elsewhere, whether in the Malay Peninsula or not.

* * * * *

(s) To procure the Company to be registered in any foreign country, colony or place.

* * * * *

(u) To establish, maintain, and work agencies or branch firms in any part of the world in connection with the business of the Company or any part thereof.

* * * * *

(x) To do all or any of the above things in Singapore or elsewhere in any part of the world, either as principals,

69 agents, contractors, or otherwise, and either alone or in conjunction with others, and either by or through agents, sub-contractors, trustees, corporations, or otherwise.

* * * * *

(zz) To do all such other things as are incidental or conducive to the attainment of the above objects or any of them, or which may be conveniently carried on and done in connection therewith, or which may be calculated directly or indirectly to enhance the value of or render profitable any business or property of the Company.

4. The liability of the members is limited.

The capital of the Company is \$2,500,000 divided into 7,500 preference shares of \$100 each, and 17,500 ordinary shares of \$100 each, with power to increase, subdivide, consolidate, or reduce; such preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of \$5 per cent per annum, and shall rank both as regards dividends and capital in priority to the ordinary shares. The shares forming the capital (original, increased or reduced) of the Company may be divided into such
70 classes with such preferences and other special incidents, and be held on such terms as may be prescribed by the Articles of Association of the Company for the time being or otherwise.

We, the several persons whose names and addresses are subscribed hereto, are desirous of being formed into a Company, in pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names:

Names, addresses and descriptions of subscribers.	Number of shares taken by each subscriber.
Ed. L. Lorenz-Meyer, Merchant, Hamburg, by his attorney O. Sielcken	One.
Ad. Laspe, Merchant, Hamburg, by his attorney O. Sielcken	One.
F. H. Witthoefft, Merchant, Hamburg, by his Attorney, O. Sielcken	One.
O. Sielcken, Merchant, Penang	One.

Names, addresses and descriptions of subscribers.	Number of shares taken by each subscriber.
A. G. Faber, Merchant, Singapore.....	One.
Ad. Asmus, Penang, Merchant.....	One.
F. Katenkamp, Singapore, Merchant.....	One.

Dated the eleventh day of December, 1905.

Witness to all the above signatures:

E. F. H. EDLIN,
Solicitor, Singapore.

A true copy.

(S.) E. E. COLEMAN
[SEAL.] *Registrar of Companies.*

Singapore, 16th November, 1926.

71 Singapore, Straits Settlements.

The Companies Ordinance, 1889.

Company Limited by Shares.

Articles of Association of Behn, Meyer & Company,
Limited.

1. Interpretation.

1. In these presents, unless there be something in the subject or context inconsistent therewith—

“The Company” means “Behn, Meyer & Company, Limited.”

“The Office” means the Registered Office for the time being of the Company.

“The Register” means the Register of Members to be kept pursuant to Section 51 of the Companies Ordinance 1889.

“The Directors” means the Directors for the time being.

“Month” means calendar month.

“In writing” means written or printed or partly written and partly printed.

“The Seal” means the Common Seal of the Company.

“The Ordinance” means the Companies Ordinance, 1889.

“Special Resolution” and “Extraordinary Resolution” have the meanings assigned thereto respectively by the Companies Ordinance, 1889.

Words importing the singular number only include the plural number and vice versa.

Words importing the masculine gender only include the feminine gender.

Words importing persons include corporations.

72

* * * * *

Share Capital.

* * * * *

16. The Company shall be entitled to treat the registered holder of any share as the absolute owner thereof and accordingly shall not be bound to recognize any equitable or other claim to or interest in such share on the part of any other person save as herein provided.

* * * * *

Certificates.

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17. The certificates of title to shares shall be issued under the seal of the Company and signed by a Director and countersigned by the Secretary or some other person appointed by the Directors.

18. Every member shall be entitled to one certificate for all the shares registered in his name or to several certificates each for a part of such shares. Every certificate of shares shall specify the number of the share in respect of which it is issued and the amount paid up thereon.

* * * * *

Transfer and Transmission of Shares.

27. The instrument of transfer of any shares shall be signed both by the transferor and transferee and the transferor shall be deemed to remain the holder of such shares until the name of the transferee is entered in the Register in respect thereof.

73

28. The instrument of transfer of any share shall be in the form following, or to the like effect, that is to say:

I, A. B., of —, in consideration of — paid to me by C. D., of —, do hereby transfer to the said C. D. the ordinary (or preference) share (or shares) numbered — standing in my name in the books of Behn Meyer & Company, Limited, to hold the same to the said C. D. and his assigns subject to the several conditions on which I held the same at the time of execution hereof. And I, the said C. D., do hereby agree to take the said share (or shares) subject to the same conditions.

As witness our hands — day of —, —.

29. No share shall be transferred to a person who is not a member so long as any member owning at least 2,500 shares is willing to purchase the same at the fair value thereof, unless (a) the share be transferred under clause 36, or (b) the effect of the purchase of the share by a member would reduce the members in number to less than seven.

* * * * *

35. The Company in General Meeting may make and from time to time vary rules as to the mode in which any shares specified in any transfer notice served on the Company pursuant to Clause 30 hereof shall be offered to the members and as to their rights in regard to the purchase thereof and, in particular, may give any member or class of members a preferential right to purchase the same. Until otherwise determined such shares shall be offered to the members in such order and in such manner as the Consulting Committee hereinafter referred to shall direct.

36. Any share may be transferred by a member to any son or grandson, or daughter or grand-daughter, or son-in-law or daughter-in-law, or nephew or niece, or wife or husband, or brother or sister, or brother-in-law or sister-in-law of such member, and any share of a deceased member may be transferred by his executors or administrators to any son or grandson, daughter or grand-daughter, nephew or niece, son-in-law or daughter-in-law, widow or widower, or brother or sister, or brother-in-law or sister-in-law of such deceased member, and shares standing in the

name of the Trustees of the Will of any deceased member may be transferred upon any change of Trustees to the Trustees for the time being of such will, and clause 29 hereof shall not apply to any such transfer.

37. The Directors may and shall, where so directed by the Consulting Committee hereinafter referred to, refuse to register any transfer of a share (*a*) where the Company has a lien on the share; (*b*) where it is not proved to their satisfaction that the proposed transferee is a responsible person; (*c*) where the Consulting Committee hereinafter referred to are of an opinion that the proposed transferee is not a desirable person to admit to membership. But paragraphs (*b*) and (*c*) of this clause shall not apply where the proposed transferee is already a member (holding more than ten shares) nor to a transfer made pursuant to clause 36 hereof.

* * * * *

39. Every instrument of transfer shall be left at the office of the Company for registration, accompanied by the certificate of the shares to be transferred, and such other evidence as the Directors may require to prove the title of transferor or his right to transfer the shares.

40. All instruments of transfer which shall be registered shall be retained by the Company, but any instrument of transfer which the Directors may decline to register shall, upon demand, be returned to the person tendering
75 the same for registration.

* * * * *

43. The executors or administrators of a deceased member (not being one of several joint holders) shall be the only persons recognized by the Company as having any title to the shares registered in the name of such member.

44. Any guardian of an infant member and any Committee or other legal curator of a lunatic member and any person becoming entitled to shares in consequence of the death of or bankruptcy of any member, upon producing such evidence as the Directors may think sufficient, that he sustains the character in respect of which he proposes to act under this clause or of his title, may, with the consent

of the Consulting Committee hereinafter referred to, which they shall be under no obligation to give, and subject to the regulations as to transfer hereinbefore contained, transfer such shares to himself or any other person. This clause is herein referred to as "the transmission clause."

* * * * *

General Meetings.

63. The first general meeting shall be held at such time not being more than four months after the registration of the Memorandum of Association of the Company and at such place as the Directors may determine.

64. Subsequent general meetings shall be held at least once in every year at such time and place as the Directors may appoint.

76 65. The above mentioned general meetings shall be called ordinary general meetings; all other meetings of the Company shall be called extraordinary general meetings.

66. The Directors may, whenever they think fit, and they shall, upon a requisition made in writing or by cablegram or telegram by two members, convene an extraordinary general meeting.

* * * * *

70. The accidental omission to give any such notice to any of the members shall not invalidate any resolution passed at any general meeting.

Proceedings at General Meetings.

* * * * *

78. The chairman of a general meeting may, with the consent of the meeting, adjourn the same from time to time and place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

* * * * *

Votes of Members.

81. Every member shall have one vote for every share held by him.

82. Any person entitled under the transmission clause to transfer any shares may vote at any general meeting in respect thereof in the same manner as if he were the registered holder of such share, provided that 48 hours at least before the time of holding the meeting at which he proposes to vote, he shall satisfy the Directors of
77 his right to transfer such shares, unless the Directors shall, previously to such meeting, have admitted his right to vote thereat in respect of such shares. Any member who shall have become bankrupt shall not, while his bankruptcy continues, be entitled to exercise the right of a member to attend, vote, or act at any meeting of the Company.

* * * * *

84. Votes may be given personally or by attorney or by proxy. The power of attorney appointing an attorney shall be under the hand and seal of the appointer, or if such appointer is a Corporation under its Common Seal, and shall be attested by one or more witnesses. The instrument appointing a proxy shall be in writing under the hand of the appointer, or his attorney acting under a power of attorney, or if such appointer is a Corporation under its Common Seal, and shall be attested by one or more witnesses. Any person, whether he is a member of the Company or not, may be appointed attorney by proxy.

* * * * *

89. A resolution in writing signed by members entitled at a poll to three-fifths of the votes shall be as valid and effectual as a resolution of a general meeting. But this clause shall not apply to a resolution for winding up the Company, or to a resolution passed in respect of any matter which by Ordinance or the regulations of the Company for the time being ought to be dealt with by a special or an extraordinary resolution.

Directors.

78 90. Until otherwise determined by a general meeting the number of Directors shall not be less than 5 or more than 7.

91. The first Directors shall be Messrs. Hans Becker, Augustus George Faber, Friedrich Katenkamp, Hermann Riege, and Adolf Asmus, and they shall continue in office until the first general meeting to be held in the year 1907. Subsequent Directors shall vacate office at the ordinary annual general meeting, but shall be eligible for re-election. Any casual vacancy occurring among the Directors may be filled up by the Consulting Committee hereinafter referred to.

* * * * *

94. The Office of Director shall be vacated:

(a) If he refuses or neglects to carry out or comply with any general or special directions given or issued by the Consulting Committee hereinafter referred to.

(d) If he shall absent himself from the Meetings of Directors for more than three months without special leave of absence from the Directors.

(e) If, being a Manager of the Company, he cease to be such Manager.

(h) If he cease to be a shareholder in the Company.

* * * * *

98. The following regulations shall apply to the Directors:

(i) The Directors may meet together in Singapore for the despatch of business, adjourn and otherwise regulate their meeting and proceed as they think fit. Two Directors shall be a quorum.

* * * * *

99. All acts done by any meeting of the Directors, or by a Committee of Directors, or by any person acting as a Director, shall, notwithstanding that it shall afterwards be discovered that there was some defect in the appoint-

79 ment of such Directors or persons acting as afore-
 said, or that they or any of them were disqualified,
 be as valid as if every such person had been duly
 appointed and was qualified to be a Director.

* * * * * *

Powers of Directors.

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105. Without prejudice to the general powers conferred by the last preceding clause and the other powers conferred by these presents, it is hereby expressly declared that the Directors shall have the following powers, that is to say:

* * * * * *

(6) To institute, conduct, defend, compound, or abandon any legal proceedings by and against the Company or its officers or otherwise, concerning the affairs of the Company, and also to compound and allow time for payment or satisfaction of any debts due to and of any claims or demands by or against the Company.

* * * * * *

(9) To determine who in Singapore and elsewhere shall be entitled to sign on the Company's behalf, bills, notes, receipts, acceptances, endorsements, cheques, releases, contracts, and documents on behalf of the Company.

(10) To appoint in Singapore or elsewhere any person or persons to accept and hold in trust for the Company any property belonging to the Company or in which it is interested, or for any other purposes and to execute and do all such deeds and things as may be requisite in relation to any such trusts.

* * * * * *

(12) From time to time to provide for the management of the Company's business, branch firms, or agencies elsewhere than in Singapore, in such manner as they think fit, and in particular to appoint any persons, firms, or other companies or corporations to be the attorneys or agents

of the Company with such powers, including power to sub-delegate and upon such terms as may be thought fit, and the Directors may appoint any Director or any firm of which any Director is a member as agents of the Company.

* * * * *

(14) To give any officer or other persons employed by the Company a commission on the profits of any particular business, or transaction, or department, or a share in the general profits of the Company, and such commission or share of profits shall be treated as part of the working expenses of the Company.

* * * * *

80 (16) To enter into all such negotiations and contracts and rescind and vary all such contracts and execute and do all such acts, deeds, and things in the name and on behalf of the Company as they may consider expedient for, or in relation to any of the matters aforesaid, or otherwise, for the purposes of the Company.

81 Consulting Committee.

107. There shall be a Consulting Committee in Europe consisting of not less than three nor more than five members of the Company. The first members thereof shall be Eduard Lorenz Lorenz Meyer, Adolf Laspe, Franz Heinrich Witthoefft and Otto Sielcken, who shall respectively hold office during their respective lives, or unless or until he or they shall cease to hold the qualification hereinafter mentioned, or shall retire or cease to be a member or members of the firm of Arnold Otto Meyer, Hamburg, or of any firm to be established in London by Arnold Otto Meyer, or cease to be the representative in London of the firm of Arnold Otto Meyer.

108. The qualification for a member of the Consulting Committee shall be the holding either in his own right or otherwise of shares or stock in the Company of the nominal value of \$150,000. A member of the Consulting Committee upon ceasing at any time to be the holder of such qualification, shares or stock, shall, ipso facto, cease to be a mem-

ber of the Consulting Committee and be deemed to have vacated office.

109. Any casual vacancy occurring in the Consulting Committee may be filled up by a resolution of the continuing members thereof, appointing a member to fill such vacancy. Any person so appointed shall retain office until the next annual general meeting of the Company.

110. At the date of every annual meeting, every member of the Consulting Committee, except such of the first members aforesaid, as may then be members thereof, shall retire from office, but such retiring members shall be eligible for election or re-election.

111. The Company shall at every annual general meeting at which members of the Consulting Committee shall
82 retire from office, appoint members to fill up the vacancies caused by such retirement or any vacancies in the Consulting Committee then existing.

* * * * *

Proceedings of the Consulting Committee.

113. The Consulting Committee may meet together for the transaction of business, adjourn and otherwise regulate their meetings and the summoning of their meetings as they think fit and may determine the quorum necessary for the transaction of business by the Committee.

* * * * *

117. The Consulting Committee shall have power from time to time either verbally, by cablegram, or letter, or by an Attorney duly appointed for that purpose to issue and give to the Directors all such general or special directions with regard to the management of the Company's business or any matter connected therewith or incidental thereto, and not inconsistent or contrary to the Ordinance, as they may think fit, and all such directions shall be implicitly carried into effect and obeyed by the Directors forthwith or within such time as shall be limited by the Consulting Committee or in default of limitation as shall be reasonable under the circumstances.

* * * * *

Accounts.

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134. The books of account shall be kept at the registered office of the Company at Singapore or at such other place or places as the Directors think fit.

* * * * *

83 Names, Addresses, and Descriptions of Subscribers.

Ed. L. Lorenz-Meyer, Merchant, Hamburg, by his Attorney, O. Sielcken.

Ad. Laspe, Merchant, Hamburg, by his Attorney, O. Sielcken.

F. H. Witthoefft, Merchant, Hamburg, by his Attorney, O. Sielcken.

O. Sielcken, Merchant, Penang.

A. G. Faber, Merchant, Singapore.

Ad. Asmus, Penang Merchant.

84 F. Katenkamp, Singapore, Merchant.

Dated this eleventh day of December, 1905.

Witness to all the above signatures:

E. F. H. EDLIN,
Solicitor, Singapore.

A true copy.

(S.) E. E. COLEMAN,
[SEAL.] *Registrar of Companies.*

Singapore, 16th November, 1926.

* * * * *

Shipping Department.

Behn, Meyer & Co., Ltd.

Singapore, 21st May, 1909.

To the Registrar of Joint Stock Companies,
Singapore.

SIR:

I have the honour to notify you that the following resolution was duly passed at an extraordinary General Meet-

ing of our Company held on Monday the 15th June 1908 at noon at the registered office of the Company:

“That the capital of the Company be raised in accordance with para. 7 of the articles of association by
85 “the creation and issue of 2,500 new preferential
“shares of Dollars 100.—each conferring the right
“to a fixed cumulative preferential dividend at the rate
“of Dollar 5 per cent per annum and ranking both as regards dividends and capital in priority to the ordinary
“shares and of 2,500 ordinary shares of Dollars 100 each.”

Herewith I beg to enclose cheque for \$15, being payment of \$12.50 for the balance due for fees on the increase of Capital in accordance with Table B of the Ordinance, bringing our total payment up to \$500 and \$2.50 fee for recording this Notice.

I regret that this notice has not been given beforehand owing to my ignorance of the law on the subject.

I have the honour to be, Sir,

Your obedient servant,
(Sd.) E. LEHRENKRAUSS,
Secretary.

A True copy.

(S.) E. E. COLEMAN,
[SEAL.] *Registrar of Companies.*

Singapore, 16th November 1926.

86 Mr. Laspe continued his testimony as follows:

“I am a member of the Consulting Committee of Behn, Meyer & Company, Ltd. That is a committee quite distinct from the Board of Directors of the company. I am the Adolf Laspe mentioned in Section 107 of the Articles of Association.”

Mr. Kresel then offered in evidence the company's ordinance in 1889, Straits Settlements, as “Exhibit Behn, Meyer & Company, No. 12” and the company's ordinance 1923, Straits Settlements, as “Exhibit Behn, Meyer & Company, Ltd., No. 13.” The material parts of said ordinances are as follows:

87

Ordinance No. V of 1889.

An Ordinance for the Incorporation, Regulation, and Winding-up of Trading Companies and Other Associations.

* * * * *

6. Any seven or more persons associated for any lawful purpose may by subscribing their names to a memorandum of association and otherwise complying with the requisitions of this Ordinance in respect of registration form an incorporated Company with or without limited liability.

* * * * *

11. The memorandum of association shall be signed by each subscriber in the presence of and be attested by one witness at the least. It shall when registered bind the Company and the members thereof to the same extent as if each member had subscribed his name thereto and there were in the memorandum contained on the part of himself his executors and administrators a covenant to observe all the conditions of such memorandum subject to the provisions of this Ordinance.

12. Any Company limited by shares may so far modify the conditions contained in its memorandum of association if authorised to do so by its regulations as originally framed or as altered by special resolution in manner
88 hereinafter mentioned as to increase its capital by the issue of new shares of such amount as it thinks expedient or to consolidate and divide its capital into shares of larger amount than its existing shares or to convert its paid-up shares into stock; but save as aforesaid and save as hereinafter provided no alteration shall be made by any Company in the conditions contained in its memorandum of association.

* * * * *

32. A Company shall on the application of the transfer or of any share or interest in the Company enter in its register of members the name of the transferee of such share or interest in the same manner and subject to the same con-

ditions as if the application for such entry were made by the transferee.

* * * * *

41. (1) The articles of association shall be printed and shall be signed by each subscriber in the presence of and be attested by one witness at the least.

(2) When registered they shall bind the Company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto and as if there were in such articles contained a covenant on the part of himself his heirs executors and administrators to conform to all the regulations contained in such articles subject to the provisions of this Ordinance.

* * * * *

42. (1) The memorandum of association and the articles of association (if any) shall be delivered to the Registrar of Joint Stock Companies hereinafter mentioned who shall retain and register the same.

* * * * *

89 43. (1) Upon the registration of the memorandum
of association and of the articles of association in
cases where articles of association are required by this
Ordinance or by the desire of the parties to be regis-
90 tered the Registrar shall certify under his hand that
the Company is incorporated and in the case of a
limited Company that the Company is limited and there-
upon the subscribers of the memorandum of association
together with such other persons as may from time to time
become members of the Company shall be a body corporate
by the name contained in the memorandum of association
capable forthwith of exercising all the functions of an in-
corporated Company and having perpetual succession and
a common seal with power to hold lands but with such lia-
bility on the part of the members to contribute to the as-
sets of the Company in the event of the same being wound
up as is hereinafter mentioned.

(2) A certificate of the incorporation of any Company given by the Registrar shall be conclusive evidence that all

the requisitions of this Ordinance in respect of registration have been complied with.

* * * * *

48. The shares or other interest of any member in a Company under this Ordinance shall be personal estate capable of being transferred in manner provided by the regulations of the Company and shall not be of the nature of real estate and each share shall in the case of a Company having a capital divided into shares be distinguished by its appropriate number.

49. The subscribers of the memorandum of association of any Company under this Ordinance shall be deemed to have agreed to become members of the Company whose memorandum they have subscribed and upon the registration of the Company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed with a Company under this Ordinance to become a member of such Company and whose name is entered on the register of members shall be deemed to be a member of the Company.

91 50. Any transfer of the share or other interest of a deceased member of a Company under this Ordinance made by his personal representative shall notwithstanding such personal representative may not himself be a member be of the same validity as if he had been a member at the time of the execution of the instrument of transfer.

* * * * *

57. A certificate under the common seal of the Company specifying any shares or stock held by any member of a Company shall be prima facie evidence of the title of the member to the share or shares or stock therein specified.

* * * * *

78. Subject to the provisions of this Ordinance and to the conditions contained in the memorandum of association any Company formed under this Ordinance or the Indian Companies Act 1866 may in general meeting from time to time by passing a special resolution in manner here-

inafter mentioned alter all or any of the regulations of the Company contained in the articles of association or in the table marked A in the first schedule where such table is applicable to the Company or make new regulations to the exclusion of or in addition to all or any of the regulations of the Company and any regulations so made by special resolution shall be deemed to be regulations of the Company of the same validity as if they had been originally contained in the articles of association and shall be subject in like manner to be altered or modified by any subsequent special resolution.

* * * * *

80. (1) A resolution passed by a Company under this Ordinance shall be deemed to be special whenever a resolution has been passed by a majority of not less than
92 three-fourths of such members of the Company for the time being entitled according to the regulations of the Company to vote as may be present in person or by proxy (in cases where by the regulations of the Company proxies are allowed) at any general meeting of which notice specifying the intention to propose such resolution has been duly given and such resolution has been confirmed by a majority of such members for the time being entitled according to the regulations of the Company to vote as may be present in person or by proxy at a subsequent general meeting of which notice has been duly given and held at an interval of not less than fourteen days nor more than one month from the date of the meeting at which such resolution was first passed.

* * * * *

81. (1) In default of any regulations as to voting every member shall have one vote and in default of any regulations as to summoning general meetings a meeting shall be held to be duly summoned of which seven days' notice in writing has been served on every member in manner in which notices are required to be served by the table marked A in the first schedule hereto.

(2) In default of any regulations as to the persons to summon meetings five members shall be competent to sum-

mon the same and in default of any regulations as to who is to be chairman of such meeting it shall be competent for any person elected by the members present to preside.

* * * * *

94. (1) Every Company under this Ordinance shall cause minutes of all resolutions and proceedings of general meetings of the Company and of the directors or managers of the Company in cases where there are directors or managers to be duly entered in books to be from time to time provided for the purpose; and any such minute as
93 aforesaid if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had or by the chairman of the next succeeding meeting shall be received as evidence in all legal proceedings.

(2) Until the contrary is proved every general meeting of the Company or meeting of directors or managers in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened and all resolutions passed thereat or proceedings had to have been duly passed and had and all appointments of directors managers or liquidators shall be deemed to be valid and all acts done by such directors managers of liquidators shall be valid notwithstanding any defect that may afterwards be discovered in their appointments or qualifications: Provided always that nothing in this section shall be deemed to give validity to acts done by a director manager or liquidator after his appointment has been shown to be invalid.

* * * * *

Ordinance No. XIII of 1923.

16. (1) Subject to the provisions of this Ordinance and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles; and any alteration or addition so made shall be as valid as if originally contained in the articles and be subject in like manner to alteration by special resolution.

* * * * *

25. (1) The shares or other interest of any member in the company shall be movable property, transferable in manner provided by the articles of the company, and shall not be of the nature of immovable property.

* * * * *

26. A certificate under the common seal of the
94 company specifying any shares or stock held by any member shall be *prima facie* evidence of the title of the member to the shares or stock.

27. (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in the register of members, shall be a member of the company.

28. (1) Every company shall keep in one or more books a register of its members, and enter therein the following particulars:

(a) the names and addresses, and the occupations, if any, of the members, and, in case of a company having a share capital, a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member;

(b) the date at which each person was entered in the register as a member; and

(c) the date at which any person ceased to be a member.

* * * * *

32. A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer.

* * * * *

36. The register of members shall be *prima facie* evidence of any matters by this Ordinance directed or authorized to be inserted therein.

* * * * *

67. (1) Every company shall hold an ordinary general meeting once in every calendar year and not more than fifteen months after the holding of the last preceding ordinary general *general* meeting, and at such meeting, not being the statutory meeting, a balance sheet made out as at a date not more than six months before such meeting shall be laid before the company, and, if such meeting is not so held or if such balance sheet is not so laid before the company, the company and every director, manager, secretary and other officer of the company, who is knowingly a party to the default, shall be liable to a fine not exceeding five hundred dollars.

(2) When default has been made in holding a meeting of the company in accordance with this section, the Court may on the application of any member of the company call or direct the calling of a general meeting of the company.

* * * * *

69. (1) Notwithstanding anything contained in the articles of a company, the directors of a company shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting of the company.

* * * * *

(6) Any meeting convened under this section by the requisitionists shall be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors.

* * * * *

72. (1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy, where proxies are allowed, at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

(2) A resolution shall be a special resolution when
96 it has been

(a) passed in the manner required for the passing of an extraordinary resolution; and

(b) confirmed by a majority of such members entitled to vote as are present in person or by proxy, when proxies are allowed, at a subsequent general meeting of which notice has been duly given, held after an interval of not less than fourteen days nor more than one month from the date of the first meeting.

* * * * *

74. (1) Every company shall cause minutes of all proceedings of general meetings and of meetings of its directors or managers to be entitled in books kept for that purpose.

(2) Any such minute purporting to be signed by the chairman of the meeting at which the proceedings were had or by the chairman of the next succeeding meeting shall be evidence of the proceedings.

(3) Until the contrary is proved, every general meeting of the company or meeting of directors or managers in respect of the proceedings whereof minutes have been so made shall be deemed to have been duly held and convened, and all proceedings had thereat to have been duly had, and all appointments of directors, managers, or liquidators made thereat shall be deemed to be valid.

* * * * *

77. The acts of a director or manager shall be valid notwithstanding any defect that is afterwards discovered in his appointment or qualification.

* * * * *

121. (1) A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorized officer of the company and need not be under its common seal.

* * * * *

97 Mr. Laspe then continued his testimony as follows:

“Just prior to the outbreak of the European War in 1914 Behn, Meyer & Company, Ltd. had other branch firms than the one located in Singapore. They had branch firms in Penang, Straits Settlements, three firms in Java (at Batavia, Sourabaya and Semarang), a branch firm in Sumatra, at Telok-Batong, at Bangkok, Siam, at Sandakan in British North Borneo, four firms in the Philippines (in Manila, Cebu, Ilo-Ilo and Samboanga). Behn, Meyer & Company, Ltd. had an Agency in Rangoon in India. Behn, Meyer & Company, Ltd. did not do business under their name anywhere else than those places that I have mentioned. Each branch firm had a manager. Each had its separate capital. Each had a separate set of books of account. With reference to its receivables, each attended to its own collections. With reference to its records, correspondence, books of account, each had its own separately, as distinguished from all the others. In these respects each was independent of the others. They did business in the same name, Behn, Meyer & Company, Ltd. Those were the only places where it did business, which was under the name of Behn, Meyer & Company, Ltd. with the addition of “so and so branch,” meaning Batavia or wherever it may be. At the outbreak of the European War the directors of Behn, Meyer & Company, Ltd. were Mr. Diehn, Mr. Schoenberg, Mr. Schubert, Mr. Menzi and Mr. Rademacher. Mr. Diehn was the General Manager located at Singapore at the outbreak of the war. During the European War he did not live in Germany. Mr. Menzi was the manager of the Philippine branch in Manila. Mr. Diehn’s nationality was German. At the outbreak of the war Mr. Menzi was in the Philippines. He was not in Germany during the war. His nationality was Swiss. Mr. Schubert was connected with the branch firm at Penang. He was in Penang at the outbreak of the war. He was not in Germany during the war. His nationality was German. Mr. Schoenberg was connected with the firm at Singapore. He was there when the war broke out. He did not go to Germany during the war. He was in the United States during the war. Mr. Rademacher was situated at Surabaya. He was there at the outbreak of the war in charge

of the business. He did not go to Germany during the war. No director was in Germany during the war. Behn, Meyer & Company, Ltd. was never incorporated in Germany or Austria-Hungary or any other country with which the United States was at war during the World War, or within any territory occupied by the military or naval forces of such a country. Its sole place of incorporation was the Straits Settlements. From the time the United States went into the war on April 6, 1917, none of these branch firms of Behn, Meyer & Company, Ltd. did anything in Germany or Austria-Hungary or any other country with which the United States was at war during the late World War, or in any territory occupied by the military or naval forces of such a country. From the outbreak of the European War in 1914 there was no communication between Germany and these outlying branch firms. In so far as Arnold Otto Meyer had been acting as agent in Germany for Behn, Meyer & Company, Ltd. it did nothing after the outbreak of the European War in that respect. Business stopped. Behn, Meyer & Company, Ltd. never had any branch or firm, nor did it do any business or have any agency in Austria-Hungary or in Turkey, or any other of those European nations that were at war with the United States.”

Mr. Kresel: Mr. Stanley, you do not now contend that whatever you seized belonged to some other Behn, Meyer & Company, Ltd. and not that corporation that is now in court? That is not your point, is it?

Mr. Stanley: No, I do not make that point.

Mr. Kresel: Then it is not necessary for me to read this in.

Mr. Stanley: I will make the point that the property has ceased to be any Behn, Meyer & Company's property, but I do not make that point that Mr. Kresel raised.

Mr. Kresel: I mean, there is no question of identity here that there is some other Behn, Meyer & Company, Ltd?

Mr. Stanley: Not that I know of.

100 Thereupon Mr. Laspe continued his testimony as follows:

“On December 13, 1921 there was a meeting of stockholders of Behn, Meyer & Company, Ltd., held in Hamburg.

A certain paper presented by Mr. Kresel was the minutes of that meeting at which I was present. I know Mr. Sielcken's signature. This is his signature. He was Chairman of the meeting."

Mr. Kresel then offered in evidence the paper identified by Mr. Laspe as Exhibit Behn, Meyer & Co., Ltd. No. 14, the material part of which was as follows:

Minutes of Extraordinary General Meeting of Shareholders of Behn, Meyer & Co., Limited, Singapore, at the Office of Mr. Arnold Otto Meyer, Hamburg, Alsterdamm 1, on Tuesday, 13th December, 1921, at Noon.

Present: Mr. E. L. Lorenz-Meyer, Mr. F. H. Witthoefft, Mr. O. Sielcken, Mr. H. Schubert.

Waivers of notice of the meeting are signed by all present shareholders and ordered to be filed.

Mr. Lorenz-Meyer then proposes and Mr. Laspe seconds the appointment of Messrs. Emil Martens, of New York, U. S. A., American citizen; Karl Auer, of Amsterdam, Werner Engler, of St. Gallen, Switzerland, of Swiss nationality; O. M. H. Sielcken, Hamburg; R. Schubert, of Hamburg, as directors of the Company, which is unanimously approved of.

Mr. O. M. H. Sielcken is then elected as Chairman of the meeting and takes the chair.

The chairman proposes the reelection of Messrs. E. L. Lorenz-Meyer, A. F. H. Laspe and F. H. Witthoefft as members of the consulting committee, which is also
101 unanimously approved of.

Further resolutions are passed to the effect that,

1.) The assignment to Mr. A. Schonberg of the claim for the Behn, Meyer & Co., Ltd. assets, evidenced by the transfer document of September 7, 1921, be and is hereby rescinded.

2.) A claim shall be filed with the Alien Property Custodian of the United States for the assets and all avails thereof of the Philippine branches of Behn, Meyer & Co., Limited, and

3.) A suit or suits if necessary to enforce such claim, shall be instituted and prosecuted by retaining Messrs. Jerome, Rand & Kresel of New York as attorneys for the company for the purpose.

4.) Authority be given to the Board of Directors or one or more members thereof, to take any and all action or steps necessary or proper in the premises.

5.) Mr. Emil Martens of New York be appointed as attorney for the company and a power of attorney for the purpose be executed.

O. M. H. SIECKEN,
As Chairman.

102 Mr. Laspe continued his testimony by stating:

“On the day that the meeting of the stockholders was held there was a meeting of the directors of Behn, Meyer & Company, Ltd. at the same place. A paper presented to him by Mr. Kresel was the minutes of this meeting and the signatures thereon were those of Mr. Siecken and Mr. Schubert.”

Mr. Kresel then put in evidence minutes of the meeting of the Board of Directors of Behn, Meyer & Company, Ltd. of December 13, 1921 as Exhibit Behn, Meyer & Co., Ltd. No. 15, the material part of which was as follows:

Minutes of Meeting of Directors of Behn, Meyer & Co., Ltd., Singapore, at the Office of Mr. Arnold Otto Meyer, Hamburg, Alsterdamm 1, on Tuesday, 13th December, 1921, at 2 p. m.

Present: Mr. O. M. H. Siecken, Mr. R. Schubert, Directors.

Waivers of notice of the meeting are signed by the directors present and ordered to be filed.

It is further resolved that

1.) Owing to circumstances out of the control of the company this and all further meetings of directors may be held in Hamburg until otherwise decided and approved by the Consulting Committee.

2.) In accordance with the resolutions passed at the Extraordinary General Meeting of shareholders notice of claim against the Alien Property Custodian at Washington be filed and a suit or suits to enforce the same
103 be instituted and Messrs. Jerome, Rand & Kresel be retained for the purpose, further that Mr. A. M. H. Siecken be authorized to execute any necessary instruments, further that Mr. Emil Martens of New York be ap-

pointed as attorney of this company and that the execution of the power of attorney by Mr. O. M. H. Sielcken be sanctioned.

O. M. H. SIELCKEN.

104 Mr. Laspe continued his testimony by saying:

“On the same day, December 13, 1921, the consulting committee held a meeting. A document shown by Mr. Kresel was the minutes of that meeting.”

Mr. Kresel then put in evidence as Exhibit Behn, Meyer & Co., Ltd. No. 16 the minutes of the meeting of the consulting committee held December 13, 1921, the material parts of which are as follows:

Minutes of Meeting of the Consulting Committee of Behn, Meyer & Co., Limited, Singapore, at the Office of Mr. Arnold Otto Meyer, Hamburg, on Tuesday, 13th December, 1921, at 4 p. m.

Present: Mr. E. L. Lorenz-Meyer, Chairman; Mr. A. F. H. Laspe, Mr. F. H. Witthoefft.

The minutes of the Extraordinary General Meeting of shareholders and of the Directors' Meeting, both of this date, were laid before the members and all the resolutions passed in both meetings were approved and confirmed.

E. L. LORENZ-MEYER,
Chairman.

105 Mr. Laspe continued his testimony by identifying the signatures of Mr. Meyer and Mr. Schoenberg to a ratification of a rescission of a certain assignment and Mr. Kresel put the assignment in evidence as Exhibit Behn, Meyer & Co., Ltd., No. 17, the material parts of which are as follows:

Adolf Schoenberg.

Sao Paulo, 24 November, 1926.

Mr. Arnold Otto Meyer,
Hamburg.

DEAR SIR:

I hereby confirm to you that the assignment to me of your claim against the Alien Property Custodian at Wash-

ington, D. C. through an instrument executed in Hamburg, September 7, 1921, and reading as follows:

“We, the undersigned, being the sole proprietors of the firm Behn, Meyer & Co., Limited, in Singapore, and of that firm’s branch establishments in Manila, Cebu, Ilo-Ilo, Zamboanga, Penang, Sandakan, Batavia, Surabaya and Semarang, hereby transfer all our rights relating to the recovery of such amounts as may be standing to the credit of the above named firm of Behn, Meyer & Company, Ltd. in the books of the Alien Property Custodian in Washington, U. S. A., to Mr. Adolph Schoenberg of New York, U. S. A. so that he may encash all these amounts, treat them as his own property, and give receipt for them, which we hereby acknowledge as full and final.”

(Signed)

ED. L. LORENZ-MEYER.

AD. LASPE.

F. H. WITTHOEFFT.

was rescinded with my knowledge and consent at a shareholders’ meeting held in Hamburg at your office December 13, 1921.

A. SCHOENBERG.

106 Mr. Laspe then identified the signatures upon a certain power of attorney to Emil Martens, and Mr. Kresel put the same in evidence as Exhibit Behn, Meyer & Co., Ltd. No. 18, the material parts of which are as follows:

Know all men by these presents that Behn, Meyer & Company, Limited, a corporation organized under the laws of the Straits Settlements and having its registered office at Singapore in the Straits Settlements, hereinafter referred to as the Company, does hereby make, constitute and appoint Emil W. Martens, whose address is 43 White Street, New York City, its true and lawful attorney for it and in its name, place and stead, to take any and all action in conformity with the provisions of Section 9 of the Trading with the Enemy Act or any other provisions of said Act and the executive orders and proclamations issued pursuant thereto now in force or hereafter enacted or issued, which Company itself might take if acting in

person with reference to the recovery and/or collection of any property or the proceeds thereof, money, deed or claim which it may own or have and which is now or may hereafter be in the possession of the Alien Property Custodian by virtue of the Trading with the Enemy Act or in case of a deed or claim funds available for the payment of which may be in the possession of the Alien Property Custodian, whether received by the Alien Property Custodian as the property of itself or another, and the Com-

pany does hereby give its said attorney full power
107 and authority (including but not thereby limiting the
generality of the foregoing powers) to file with the said Custodian for it and in its name such notice or notices or its claim under oath in such form and containing such particulars as the said Custodian shall require to make for it and in its name whatsoever sense and applications for the conveyance, transfer, assignment or delivery to its said attorney for it of said money and/or other property as may be required or as its attorney may in his discretion deem proper, and to institute in its name such suit or suits in equity to establish the interest, right, title or deed so claimed as may be allowed by law, and to settle and/or compromise any such claim and/or suits, and upon delivery or any or all of said money or property to its said attorney to execute in its name such receipts and acquittances therefor as may be required by said Alien Property Custodian and/or by the Treasury of the United States.

And the Company does give and grant unto its said attorney full power and authority to do and perform all acts whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as it might and could if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that its said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

This power is given in contemplation of all provisions of the Trading with the Enemy Act, executive orders and proclamations issued pursuant thereto now existing or which
may hereafter be enacted or issued, and of all rules
108 of procedure with respect to claim under Section 9
now in force or which may hereafter be promulgated.

In witness whereof the said Company has caused its corporate name to be hereunto subscribed this 14th day of December, 1921.

BEHN, MEYER & COMPANY, LTD.,
By ED. L. LORENZ-MEYER.
AD. LASPE.
F. H. WITTHOEFFT.
O. M. H. SIELCKEN,
As Director.

109 Mr. Laspe then identified the signature of Mr. Werner Engler, who he stated was one of the stockholders of Behn, Meyer & Company, Ltd. to a certain ratification and Mr. Kresel put the same in evidence as Exhibit Behn, Meyer & Co., Ltd. No. 20, the material parts of which are as follows:

Know all men by these presents that I, Werner Engler of St. Gallen, Switzerland, was on December 13, 1921, and had been since prior to September 19, 1914, a registered shareholder of 501 shares of the ordinary shares of Behn, Meyer & Co., Ltd., a corporation of the British Straits Settlements, that I have read the annexed minutes of the meeting of shareholders held in Hamburg, Germany, on December 13, 1921, and that I hereby ratify, approve and confirm without qualification all and singular the action taken at said meeting as fully to all intents and purposes as if I had been duly present thereat and had then and there personally voted therefor or consented thereto.

In witness whereof I have this 20th day of October, 1926, set my hand and seal at the city of Hamburg.

P. J. WERNER ENGLER. (L. C.)

Attached were minutes of the meeting of shareholders of December 13, 1921, as found in Exhibit 14.

110 In connection with this ratification Mr. Laspe testified that Mr. Eugen Engler lived in Germany and Mr. Kresel put in evidence as Exhibit Behn, Meyer & Co., Ltd. No. 19, an exemplified copy of a Certificate of Inheritance issued by the Hamburg District Court February 19, 1919, the material parts of which are as follows:

“On the 11th day of February, 1919, there died at Hamburg Consul Ulrich Eugen Engler who had been a Swiss

subject. His sole heir has been proved to be Peter Johannes Werner Engler, a candidate in engineering, born in Penang on April 23, 1896.”

111 Mr. Kresel then put in evidence as Exhibit Behn, Meyer & Co. Ltd. No. 21 a ratification by P. J. Werner Engler in the same form as Exhibit 20, except that it purported to be a ratification of the meeting of the shareholders, a meeting of the consulting committee and a meeting of the directors all of December 13, 1921. The minutes of the meeting were attached in the form hereinbefore shown in Exhibits 14, 15 and 16.

112 To all of these Exhibits Messrs. Stanley and Gordon objected at the time they were introduced, and they were admitted without any waiver on the part of either side as to their relevancy.

The Court said:

“I will take the facts assuming that they are relevant to the inquiry and then when I come to decide the case I will have to say whether they have any such effect as is contended for.”

The Court further stated:

“Nothing is proved by these papers except the fact that some one undertook to do something—unless it turns out that they had the right to do it and then of course it is different.”

The Court further stated:

“Unless there is some added objection it will be understood that these papers are all admitted over the objections originally made by Mr. Stanley and Mr. Gordon, and anything that has been added to the original objection by way of objection to the special instrument referred to and that these instruments are admitted subject to motion to strike out.

Mr. Stanley: Very well, your Honor, that will save repeating the objection so often.

Mr. Gordon: And with that understanding we will not make objection each time.

113 Mr. Kresel then introduced in evidence certain ratifications which were severally identified by Mr. Laspe as follows:

Ratifications by Mr. Auer, dated November 1, 1926, as Exhibit Behn, Meyer & Co., Ltd. No. 22.

Ratification by Mr. Lehrenkrauss, dated October 20, 1926, as Exhibit Behn, Meyer & Co., Ltd. No. 23.

Ratification by Mr. Rademacher, dated October 27, 1926, as Exhibit Behn, Meyer & Co., Ltd. No. 24.

Ratification by Mr. Schoenberg, dated November 24, 1926, as Exhibit Behn, Meyer & Co., Ltd. No. 25.

Ratification by Mr. Menzi, dated November 29, 1926, as Exhibit Behn, Meyer & Co., Ltd. No. 26.

These ratifications with appropriate changes for names and dates were in form as follows:

“Know all men by these presents, that I, ———, of ———, was on December 13, 1921, and had been since prior to September 19, 1914, a registered shareholder of — shares of the ordinary shares of Behn, Meyer & Co., Ltd., a corporation of the British Straits Settlements; that I have read the annexed minutes of meeting of the shareholders held at Hamburg, Germany, on December 13, 1921, and that I hereby ratify, approve and confirm without qualification all and singular the action taken at said meeting as fully to all intents and purposes as if I had been duly present thereat and had then and there personally voted therefor or consented thereto.”

114 Mr. Kresel then put in evidence a ratification by Mr. Emil Martens as a director of Behn, Meyer & Company, Ltd., as Exhibit Behn, Meyer & Co., Ltd. No. 27, which was in the same form except that it purported to ratify the meetings of the shareholders, directors and consulting committee.

115 In connection with this ratification objection was made that a director must be personally present and could not ratify acts at a meeting at which he was absent. In this connection the Court said:

“An objection which, if the act could be cured ought to be made, of course should be made now. But if these instruments have no legal effect, any objection or anything

else would not give them any legal effect, nor would it deprive them of something they did not have.”

Mr. Kresel: I understand of course that your Honor's ruling was just to that effect. I think if there are any objections which the other side wish to make, and which, as your Honor states, are objections which could be cured if attention is called to the matter, that they must be made now.

The Court: But as to the legal effect of these papers, it is either something or nothing.

116 Mr. Kresel then put in evidence a resolution purporting to be made by Messrs. Laspe and Witthoefit pursuant to Article 89 of the Articles of Association of Behn, Meyer & Co., Ltd., dated November 3, 1926, the signatures of Mr. Witthoefit and Mr. Laspe to which were identified by the witness, Mr. Laspe, as Exhibit Behn, Meyer & Co., Ltd. No. 28, the material parts of which are as follows:

Resolution.

Whereas questions have arisen or may arise as to the validity of certain Acts done and resolutions passed in the name of the Company, and it is therefore expedient to set at rest all such questions; and whereas an Extraordinary General Meeting of the members of the Company was held at the office of Arnold Otto Meyer, 1, Alsterdamm, Hamburg, on Tuesday the 13th December, 1921, at which meeting certain Directors were elected and it was decided to take proceedings in New York against the Alien Property Custodian to recover the assets and/or the proceeds of liquidation of the assets of the Company's business in the Philippines, and to appoint one Emil Martens the attorney of the Company for the purpose of taking such proceedings.

Now it is hereby resolved as follows:

a) That all acts done and resolutions passed at the said Meeting held on the 13th December 1921 be and the same are hereby ratified and confirmed.

b) That the appointment of the said Emil Martens as attorney of the Company for the purpose of the said proceedings in New York and the Power of Attorney given to him be and the same are hereby ratified and confirmed.

c) That all acts done and resolutions passed by any person or persons acting or purporting to act as Director or Directors of the Company or by any person or persons acting under or in pursuance of any Power of Attorney or other Authority given or purporting to be given by the Directors on behalf of the Company, be and the same are hereby ratified and confirmed.

d) That all the foregoing ratifications and confirmations shall operate and take effect as on the 13th December, 1921, and/or the respective dates of the doing of the Acts or passing of the resolutions.

e) That it is hereby confirmed and declared that the present Directors of the Company are 1) Emil Martens, 2) Karl Auer, 3) Werner Engler, 4) Friedrich Wilhelm Mulder, 5) Albrecht Lorenz-Meyer and 6) Adolf Schöenberg, and that they shall remain in office until the first General Meeting of the Company to be held in the year 1928.

f) That the present Consulting Committee of the Company consists of 1) Adolf Laspe, 2) Franz Heinrich Witthoefft and 3) Albrecht Lorenz-Meyer.

Dated at Hamburg the 3rd day of November, 1926.

(Signed)

AD. LASPE.

“

F. H. WITTHOEFFT.

118 Mr. Laspe continued his testimony as follows:

“Since the meeting of December 13, 1921, there has been a change in the Board of Directors. Mr. Sieleken died, Mr. Lorenz-Meyer died, and Mr. Lorenz-Meyer, Jr., was put on the Board of Directors. Albrecht Lorenz-Meyer took the place of Edward Lorenz-Meyer on the consulting committee. Frederick W. Mulder was elected a director. The directors at present are Mr. Martens, Mr. Mulder, Mr. Lorenz-Meyer, Mr. Auer, Mr. Engler and Mr. Schoenberg.

“A meeting of the stockholders of Behn, Meyer & Company, Ltd., was called November 3, 1926, to be held January 3, 1927. I attended to the sending of the notices of that meeting to the stockholders. Notice was sent to all the stockholders by me. I mailed it myself. The paper handed me by Mr. Kresel is the form of notice that was sent on that meeting. I did not attend that meeting personally on January 3, 1927. Mr. Witthoefft represented me at the meeting. I signed this instrument in the form of a proxy

to Mr. Witthoefft to represent me. I identify signatures of Mr. Witthoefft, Dr. Peterson, sole executor of the last will of Mr. Edward L. Lorenz-Meyer, Mr. Adolph Schoenberg, Mr. Rademacher, Mr. Werner Engler and Mr. F. W. Mulder to the minutes of the meeting. I mailed the notices on the 3rd of November, 1926."

Mr. Kresel then offered in evidence the notice of meeting dated November 3, 1926, identified by Mr. Laspe as Exhibit Behn, Meyer & Co., Ltd. No. 29, the material parts of which are as follows:

119 Behn, Meyer & Company, Ltd.

Notice is hereby given that an Extraordinary General Meeting of the shareholders in Behn, Meyer & Co., Ltd. will be held in the office of Arnold Otto Meyer, No. 1 Alsterdamm, Hamburg, on Monday the 3rd day of January, 1927, at 4 o'clock in the afternoon, when the sub-joined resolution will be submitted for consideration and adoption with or without modification:

(There followed the resolution in the same words and figures as in Exhibit 28.)

Hamburg, 3rd day of November, 1926.

(Signed) P. J. WERNER ENGLER,
FRIEDRICH WILHELM SIELCKEN,
Directors.

AD. LASPE,
F. H. WITTHOEFFT,
*Members Holding Together More Than
Three-fifths of the Voting Rights.*

See Article 89.

120 Mr. Kresel then offered in evidence as Exhibit Behn, Meyer & Co., Ltd. No. 30 the proxy identified by Mr. Laspe, the material part of which is as follows:

Behn, Meyer & Company, Ltd.

I, Adolph Laspe, of Hamburg, being a member of the above named company, hereby appoint Mr. Franz Heinrich Witthoefft of Hamburg as my proxy to vote for me and on my behalf at the Extraordinary General Meeting of the Company to be held on the 3rd day of January, 1927, and at any adjournment thereof.

Witness my hand this 13th day of December, 1927.

AD. LASPE.

Signed by the said Mr. Adolph Laspe in the presence of
A. GUILDER.

121 Mr. Kresel then offered in evidence the minutes identified by Mr. Laspe as Exhibit Behn, Meyer & Co., Ltd. No. 31, the material parts of which are as follows:

Behn, Meyer & Company, Ltd.

Extraordinary General Meeting of the Members of Behn, Meyer & Co., Ltd., Held at the Office of Arnold Otto Meyer, No. 1 Alsterdamm, Hamburg, on Monday, the 3rd day of January, 1924, at 4 o'clock in the Afternoon.

Present:

Mr. F. H. Witthoefft, in the chair.

Mr. Adolph Laspe, by his proxy, Mr. F. H. Witthoefft.

Dr. Gustav Peterson, as sole executor under the last will of Mr. Ed. L. Lorenz-Meyer, deceased.

Mr. Adolph Schoenberg.

Mr. Georg Rademacher.

Dr. Werner Engler.

Mr. Friedrich Wilhelm Mulder.

The notice convening the meeting having been read by the Chairman and no member having any inquiry to make, the following resolution which was put by the Chairman, was unanimously passed. (The resolution was in the same form as in Exhibit 28).

Dated Hamburg, the 3rd day of January, 1927.

(The minutes were signed by the persons who were stated to be present.)

122 Mr. Stanley reserved objection to this being evidence of the minutes of the meeting, there being nobody testifying that was present at the meeting.

123 Mr. Laspe further testified:

“At the outbreak of war between the British Empire and the Imperial German Government, M. H. Sielcken was not

a director of the company. E. L. Lorenz-Meyer was never a director of the company. Adolph Laspe, the witness, had never been a director of the company. Emil Martens was not a director of the company prior to December 13, 1921."

This concluded the direct examination of Mr. Laspe.

Upon cross examination by Mr. Stanley Mr. Laspe testified as follows:

"Just prior to the outbreak of war between Great Britain and Germany the directors of Behn, Meyer & Company, Ltd., were Messrs. Diehn, Schoenberg, Schubert, Menzi and Rademacher. Several of them were in Singapore and several were in other places, just prior to the outbreak of the war between Great Britain and Germany. Mr. Diehn was in Singapore. So was Mr. Schoenberg. Mr. Schubert was in Penang. Mr. Menzi was in Manila, and Mr. Rademacher was in Batavia. Mr. Menzi and Mr. Rademacher were not within British possessions.

"Mr. Diehn was interned by the British in Singapore after the outbreak of the war between Great Britain and Germany. I do not know the date of his interment nor the date of his release. Mr. Diehn returned to Germany since the war but I do not know the date. I have nothing whatever to do with him. I have seen him since the war.

124 He was not present at any of these purported meetings of stockholders or directors to which Mr. Kresel has referred. He resigned as a director of Behn, Meyer & Company, Ltd. because his agreement with us terminated. That was December 31, 1914. He resigned because we did not agree with him on some matters of business. We were not in connection with Singapore in the latter part of 1914. That was prior to the outbreak of war that this came about. He announced during the first three months or so of 1914 that he would retire at the end of that year. We heard nothing further from him after he made this announcement. I never heard anything as to whether or not he did as a matter of fact retire at the end of 1914. He had given the notice. That is all I know.

"Mr. Schubert was one of the other directors just prior to the outbreak of war between Great Britain and Germany. He resided in Penang, in the Straits Settlements, British territory. I believe he was not interned. I believe

he was allowed to go to Java because he was acting German Consul in Penang. I think he returned to Germany in 1919 or 1920. He was present at these various stockholders and directors meetings in 1921. Mr. Schoenberg was in the Straits Settlements at the outbreak of war between Great Britain and Germany. He was interned. I do not know when he was released from internment. I have never seen any resignation from him as a director of Behn, Meyer & Company, Ltd. He returned to Germany, I think in 1921 or somewhere thereabout, 1922 perhaps, I can't tell the exact date. He was not present at any of the meetings in December, 1921, to which Mr. Kresel has referred. I have not seen any resignation of Schoenberg as a director.

125 At the outbreak of the war Mr. Rademacher was in Sourabaya in Java. That is in Dutch territory. He resigned as a director of Behn, Meyer & Company, Ltd. some time in 1921. I do not think his resignation was given in writing. He was not present at these various meetings that Mr. Kresel has referred to in December, 1921. He was present, I understand, in January, 1927. I saw his signature. I was not at the meeting. Menzi has been in Manila all along. E. L. Lorenz-Meyer, A. F. H. Laspe, F. H. Wittboefft, O. Sieleken, and R. Schubert resided in Hamburg, Germany, during the war except Mr. Schubert who was not there until 1919. There was no other business at the meeting on December 13, 1921, except to draw up these minutes and pass what purports to be this resolution.

"There was no business for Behn, Meyer & Company, Ltd. to do since the end of the war. The only purpose of calling the meeting on December 13, 1921, to which these minutes, Exhibit Behn, Meyer & Co., Ltd. No. 14, refer, was to authorize or purport to authorize the filing of a claim against the Alien Property Custodian for these assets and the bringing of a suit. The only business of Behn, Meyer & Company, Ltd., which they had in Germany, was the holding of the meeting of the Board of Directors, consulting committee and stockholders for the sole purpose of authorizing or confirming or ratifying action looking toward the recovery of these assets which are the subject-matter of this suit. That was the only business they performed.

"Mr. Menzi is not a resident of Germany. He is the only stockholder that is not a resident of Germany. Mr. Engler

126 was not in Germany for several years from the death of his father in 1915 or 1916 up to 1919, that is Engler, the son. The father died, I think, in 1916.

“Behn, Meyer & Company, Ltd. does not purport to maintain any offices in Germany. They do not rent any room in an office building or anything of that sort. They have no employees in Germany so far as I know. This organization, which is referred to here as the Board of Directors in the documents which Mr. Kresel introduced, does not maintain any offices in Germany or anywhere else in the world. There were probably assets of Behn, Meyer & Company, Ltd. in neutral countries at the outbreak of the Great War. There were assets in Java. There were no meetings held in Germany which purported to be directors meetings prior to the meeting of December, 1921. O. M. H. Sielcken at the outbreak of the Great War was not a stockholder of Behn, Meyer & Company, Ltd. He was a member of the firm of Arnold Otto Meyer & Company in London. He had no connection with the firm of Behn, Meyer & Company. E. L. Lorenz-Meyer was a member of the consulting committee of Behn, Meyer & Company at the outbreak of the Great War. I (Adolph Laspe) was a member of the consulting committee. Emil W. Martens had no connection whatever with respect to Behn, Meyer & Company at the outbreak of the Great War.”

This concluded the cross examination by Mr. Stanley.

127 Upon cross examination by Mr. Gordon Mr. Laspe testified as follows:

“I cannot answer the question whether Mr. Lorenz-Meyer was a German citizen and subject on September 19, 1914, because it is doubtful whether he was English or German. He was born in Singapore. There is a controversy going on now as to whether he was a British subject or a German subject so I could not tell you what he was. The witness, A. Lapse, is a German citizen and was such on September 19, 1914, and has been all the time. Mr. Witthoefft was a German citizen and subject in 1914 and has been down to date. Mr. Menzi was a Swiss citizen and is still a Swiss citizen. Mr. Engler was a Swiss. Mr. Erwin Lehrenkrauss was a German. Mr. Diehn was a German. Mr. Schubert was a German. Mr. Schoenberg was a German. Those whom I

have said to be Germans were Germans at the beginning of 1914 and have been Germans ever since and are now Germans, except those who have since died. Mr. Lorenz-Meyer died last year and Mr. Sielcken died two years ago. Mr. Engler died in 1916. The only changes in ownership of the stock have been in the case of Mr. Engler and his son has the shares of his father. Mr. Sielcken was not a stockholder. There have been only two stockholders who died, Engler and Lorenz-Meyer. Mr. Lorenz-Meyer's heirs, according to the German law, were his three children, Albrecht Lorenz-Meyer, who has been his successor in our firm, and Mrs. Peterson and Mrs. Albers. There was an arrangement that Albrecht Lorenz-Meyer might take over the shares. Mr. Lorenz-Meyer's daughters are German Nationals. I do not know about the son. I think Werner Engler was born in Germany. All of these people are of full age.

128 "In 1914 the directors were Mr. Menzi, Mr. Diehn, Mr. Schubert, Mr. Schoenberg and Mr. Rademacher. Mr. Schoenberg is still a director.

129 "Mr. Menzi ceased to be a director when the firm was liquidated in Manila. Mr. Diehn retired at the end of 1914. Mr. Schubert retired about a year and a half ago. Mr. Rademacher ceased to be a director in 1920 or 1921. Mr. Schoenberg continued to be a director. No one was appointed in the place of the retiring directors until in 1921 when Mr. Martens, Mr. Auer, Mr. Engler and Mr. Sielcken became directors. Mr. Sielcken died and Mr. Mulder was put in his place. Mr. Schubert went to Buenos Aires and Mr. Lorenz-Meyer, Jr., was put in his place. The directors at present are Messrs. Martens, Auer, Werner Engler, Mulder, Albrecht Lorenz-Meyer, and Adolph Schoenberg. These persons who have been mentioned are the only ones who have been directors from 1914 down to the present time. The only ones of them who were not German nationals and citizens were Messrs. Menzi, Engler and Auer, who are Swiss, and Mr. Martens, an American. The firm of Arnold Otto Meyer is a partnership. In 1914 the partners were Lorenz-Meyer, Sr., myself (Mr. Laspe), Mr. Witthoefft and Mr. Engler, Sr. Then Mr. Sielcken became a partner in 1915 or 1916, I think. Subsequently Mr. Sielcken died and Mr. Lorenz-Meyer died, and Mr. Lorenz-Meyer's son was admitted as a partner, so that the

partners now are myself (Mr. Lapse), Mr. Witthoefft, Mr. Lorenz-Meyer, Jr., and Mr. Schoenberg since the 1st of January of this year. Behn, Meyer & Company, Ltd., was organized under the laws of the Straits Settlements. It had branches in various places in the East Indies, which I called branch firms. These branches kept their own books, had their own debtors and creditors, etc.

Nevertheless, the books at the main office in Singapore would reflect the condition of the branches at the end of the year. The capital for these so-called branch firms was apportioned out of the total capital of the company. Dividends would be declared in Singapore by the head office at the direction of the consulting committee. These dividends would be derived indirectly from the profits of the branches, that is, the branches would have accounts with Singapore and the profits would go in to Singapore and Singapore itself would have some profits and it would all be amalgamated and go to the stockholders as dividends. There would be an account between Singapore and each branch and at convenient times when the branches got to owing Singapore too much they would pay them some money and it would go in to Singapore. They might have an account with these various branches to which the amount of profits or losses would go. The profits of the branches might be used for expanding the business of the branches or might be paid in to Singapore for distribution to the stockholders in dividends. The company had some branches in the Straits Settlements besides at Singapore. Their business was handled just the same as the branches outside the Straits Settlements were handled. The notice of a stockholders' meeting which I sent out November 3, 1926, was sent to the stockholders by post. I posted them myself in the official letter box at the door of our office to the addresses of these stockholders, none of which were in Singapore."

131 This concluded cross-examination by Mr. Gordon.

On further cross-examination by Mr. Stanley, Mr. Laspe stated that the Articles of Association of Behn, Meyer & Company, Exhibit No. 11, were the only Articles of Association and covered all these various branches that have been referred to.

132 On redirect examination Mr. Laspe testified as follows:

“The stockholders who ratified what was done at the meetings were not all in Germany. Mr. Schubert and Mr. Schoenberg were in Buenos Aires. Mr. Auer was in Amsterdam, Holland. Mr. Menzi was in the Philippines. Mr. Martens was in New York. None of the directors who were directors of the company at the outbreak of the war in 1914 were in Germany during the war. Neither Menzi, Diehn, Schubert, Schoenberg nor Rademacher were in Germany during the war. Of the stockholders Engene Engler was in Germany, Menzi was not, Lorenz-Meyer, Laspe and Witthoefft were in Germany. All of these five directors were managers of some one or more of the branches. Paragraph 94 of the Articles of Association (Exhibit 11) providing “the office of director shall be vacated if being a manager of the company he ceases to be such manager” was a provision that was not observed in Behn, Meyer & Company, during the war time because we did not know what was happening at these branches or whether they continued to be managers or not.”

This concluded the testimony of Mr. Laspe.

Christopher Nixon was then called as a witness for the plaintiffs in Equity No. 40361 and having been duly sworn testified in substance as follows:

“I am a barrister at law of the English bar. I was admitted in 1910 and practiced in England until the beginning of 1915. During that year I came to the United States. I have been admitted to practice in the courts of California and Nevada. Since coming to the United States I
133 had to deal with legal questions coming from many states of the Union and coming from Canada and England. I have been retained in matters involving the interpretation of English law. The common law of England prevails in the Straits Settlements. I have had occasion to study the Trading with the Enemy Act of England. In the Straits Settlements there were passed Trading with the Enemy Ordinances and Alien Enemies’ (Winding-up) Ordinances. I studied these for the purpose of this case.

Under the laws of the Straits Settlements an American citizen or a company incorporated under the laws of one of the United States and which is not an enemy under the laws of the Straits Settlements whose property in the Straits Settlements was nevertheless seized by officials of the Straits Settlements is entitled to recover such property or its proceeds if liquidated. A company organized under the laws of the United States and which has not during the war done business with or in the territory of any country at war with Great Britain, if its property in the Straits Settlements were seized by officials of the Straits Settlements such an American company can recover that property or the proceeds if liquidated."

This concluded Mr. Nixon's direct examination.

Upon cross-examination by Mr. Stanley Mr. Nixon testified as follows:

134 Mr. Nixon first identified a copy of the Alien Enemies' (Winding-up) Ordinance, and this was introduced in evidence by Stanley as defendants' Exhibit 1. The material parts of this Ordinance are as follows:

135 *Alien Enemy (Winding-up) Ordinance.*

Reprint of Ordinance No. 29 of 1914 as Amended by Ordinance No. I of 1915, Ordinance No. XIX of 1915, Ordinance No. XVI of 1916, Ordinance No. VI of 1917.

An Ordinance to Provide for the Winding-up of the Trade Affairs of Alien Enemies.

It is hereby enacted by the Governor of the Straits Settlements with the advice and consent of the Legislative Council thereof as follows:

1. This Ordinance may be cited as "The Alien Enemies (Winding-up) Ordinance, 1914."

2. In this Ordinance:

"Alien enemy" means an alien whose sovereign or State is at war with His Majesty, and any person or body of persons of whatever nationality resident or carrying on business in an enemy country.

“Trade” includes every kind of business, occupation and work.

“Enemy Company” means a company, one-third or more of the issued share capital or of the directorate of which, immediately before or at any time since the fourth day of August, 1914, was held by or on behalf of or consisted of persons who were subjects of, or resident or carrying on business in, a State for the time being at war with His Majesty, notwithstanding that the company is registered within His Majesty’s Dominions, and includes any company or body of persons incorporated in an enemy
136 country and any incorporated company or body of persons, wherever incorporated, carrying on business in an enemy country or in any territory for the time being in hostile occupation.

* * * * *

3. If any question arises under or in consequence of this Ordinance as to whether or not any person or company is or was an alien enemy or enemy company, a certificate under the hand of the Governor that in his opinion such person or company is or was an alien enemy or enemy company shall be sufficient proof that such person or company is or was an alien enemy or enemy company, as the case may be, and the onus of proving that such person or company is not or was not an alien enemy or enemy company shall lie upon the person asserting such to be the case.

4. (1) The Governor may appoint any person whom he may think fit as liquidator to wind up the affairs of any trade carried on in the Colony either at the commencement of this Ordinance or thereafter—

* * * * *

(c) by an enemy company or by anyone for the benefit or on behalf of an enemy company.

(2) Such liquidator may be appointed although the trade carried on in the Colony by or on behalf of such alien enemy or enemy company may have been a branch or the head office of a trade carried on also outside the Colony.

(3) The appointment of any such liquidator shall be made by writing under the hand of the Governor, and such

writing shall be conclusive evidence of such appointment for all purposes whatsoever until the appointment has been revoked by the Governor.

(4) The Governor may revoke any such appointment at any moment in his absolute discretion, and upon the
137 communication of such revocation to the liquidator his powers as liquidator shall absolutely cease and determine, without prejudice, however, to any acts bona fide done by him as liquidator before the communi-
138 cation of such revocation of such appointment, and without prejudice to the rights of any persons who may bona fide deal with him without notice of any such revocation.

(5) The rights and powers of any such liquidator shall take effect from the date of his appointment.

(6) Any such liquidator shall for all purposes whatever have as full rights—

(a) as if—

(i) the whole of the trade previously carried on in the Colony by such alien enemy or enemy company together with the good will of such trade and every part thereof; and

(ii) all the property of every description previously employed in or in connection with such trade; and

(iii) all debts, stock, shares, securities and other choses in action wherever situate due to or purchased or otherwise acquired by or on behalf of such alien enemy or enemy company; and

(iv) all the property in the Colony of such alien enemy or enemy company or standing in his or its name,

had been absolutely assigned to such liquidator for valuable consideration; and

(aI) as if all securities for money given in connection with such trade to an alien enemy or enemy company and all moneys due upon such securities and the legal or equitable estate or interest of the alien enemy or enemy company in any property moveable or immoveable comprised in such securities had been conveyed assigned or transferred to such liquidator for valuable consideration upon trust to get in and realize such securities and to pay out the proceeds of such realization to the Custodian of Enemy Property whatever is due and payable in respect of such securities

and to deal with the balance thereof as is in this Ordinance provided; and

(b) as if all the contracts of such trade had originally been entered into with such liquidator.

139 (6 (A)) On any sale of the good will of any trade by the liquidator the purchaser shall not acquire the right to use and shall not use—

(a) the name under which the trade had been carried on in the Colony without the consent of the Governor; or

(b) any registered or unregistered trade mark used in the trade carried on in the Colony without the consent of any British subject who is jointly interested in such trade mark.

(7.) Any proceedings which if this Ordinance had not come into operation might have been brought by or against such alien enemy or enemy company in respect of such trade except such proceedings as are mentioned in section 4A may be brought by or against such liquidator provided that the property held by the liquidator under this Ordinance shall not be liable to be attached or otherwise taken in execution and provided that no liquidator shall incur any liability in respect of any such winding-up beyond the assets which may have come to his hand.

(8.) Any such winding-up may be carried out without any authority for any act or omission being required from any person outside the Colony.

(9.) Every such winding-up shall, subject to the just rights of any other persons, be carried out as for the benefit of the persons entitled to the profits of such trade, or to any property dealt with by the liquidator, and all proceeds realized by such winding-up after providing for the matters referred to in sub-sections (11), (12), (12z) and (12y) shall be paid to the Custodian of Enemy Property to hold subject to such provisions of the Trading with the Enemy Ordinances, 1914 to 1916, as are applicable to monies paid to the Custodian under those Ordinances.

* * * * *

140 (10-A.) Every liquidator may require any person who, immediately before the appointment of such liquidator, managed or assisted in the management of the trade of any alien enemy or enemy company which is being

wound up, to give such assistance in connection with such winding-up as may be required.

(11.) Every liquidator shall be entitled to retain out of the assets of the trade of the alien enemy or enemy company whose trade affairs he has been appointed to wind up—

(a) The expenses incurred in the course of such winding-up including—

(i) the rent of any business premises formerly occupied by such alien enemy or enemy company which accrues while such premises are occupied by the liquidator for the purpose of such winding-up;

(ii) the expenses of obtaining legal advice and of taking legal proceedings reasonably incurred for the purposes of such winding-up;

(iii) audit fees;

(iv) any moneys which may be advanced by the
141 liquidator for the purposes of such winding-up;
and

(b) a commission not exceeding three per centum to be fixed by the Governor on the total assets realised or brought to the credit by the liquidator as remuneration for his loss of time and trouble.

(12) After providing for the matters referred to in subsection (11), the remaining assets shall be applied in payment of the following liabilities incurred in respect of the trade carried on in the Colony and in the following order or priority:

Firstly, all rates and taxes due at the date of the appointment of the liquidator and having become due and payable within twelve months next before that date;

Secondly, all wages or salary of any clerk or servant in respect of services rendered during four months before the date of the appointment of the liquidator less any sum of money due by such clerk or servant to such alien enemy or enemy company;

Thirdly, all sums of money due to the Crown;

Fourthly, rateably *pari passu* all sums due to persons or companies resident or carrying on business in the Colony who are not alien enemies or enemy companies;

Fifthly, rateably *pari passu* all sums due to persons or companies who are not resident or carrying on business in the Colony and are not alien enemies or enemy companies;

Sixthly, rateably *pari passu* all sums due to an alien enemy or enemy company in respect of whose trade
142 a liquidator has been appointed under this Ordinance.

(12z) Any liability incurred—

(a) by any branch or the head office or any other branch of the head office, not in enemy territory of the trade which is being wound up under this Ordinance; or

(b) where such trade is a branch of a head office in enemy territory; by—

(i) such head office; or

(ii) any other branch of such head office in any territory, enemy or otherwise;

may with the consent of the Governor be paid out of the assets of such trade remaining after provision has been made for the matters referred to in sub-section (12). Provided that the person or company to whom such liability is due is not an alien enemy or enemy company;

Provided further that, if such person or company resides or carries on business in a neutral country, such person or company shall only be allowed to claim in respect of any balance of such liability as remains after every remedy under the law of the enemy country or of any other country in which such branch or head office is situate has been exhausted.

(12y) Any liability in the nature of a liability referred to in sub-section (12) or sub-section (12z), but due to persons or companies who are alien enemies or enemy companies may with the consent of the Governor be paid out of the assets remaining after provision has been made for the matters referred to in sub-section (12).

143 (15) Any person who without lawful excuse—

(a) refuses to hand over to a liquidator on demand any keys, safe, office furniture, account books, cheque books, or other things of any nature whatsoever, of which he is in possession and which may have been used in connection with or which may relate to the trade of the alien enemy or

enemy company whose trade affairs such liquidator has been appointed to wind up;

(b) refuses or neglects to give any assistance which may be required by a liquidator to be given under this section; or

(c) in any way obstructs any liquidator in taking possession of any premises occupied by or on behalf of such alien enemy or enemy company immediately before the appointment of such liquidator,

shall be deemed to commit an offence against this Ordinance.

144 (16b) Every winding-up under this Ordinance shall continue in force notwithstanding the termination of the present war until all proceedings in relation to such winding-up are stayed by order of the Governor.

* * * * *

4A. Where a liquidator has been appointed to wind up the affairs of any trade carried on in the Colony by an alien enemy or enemy company, so long as the appointment of such liquidator, or of any person appointed as liquidator in succession to such liquidator, remains in force——

(a) no proceedings in Bankruptcy or in winding-up shall be brought or maintained against such alien enemy or enemy company;

(b) no such alien enemy shall be at liberty to file a petition for or in respect of his own bankruptcy;

(c) no resolution to wind up voluntarily any such enemy company shall have any force or validity or be acted upon by any Court or person.

* * * * *

8. Whereas the appointment of the person to act as liquidator to wind up the trade of Behn Meyer and Company, Limited in this Colony although made on the eighteenth day of December, 1914, was not made under the hand of the Colonial Secretary until the second day of January, 1915, it is hereby enacted that the rights and powers of such liquidator shall take effect as from the eighteenth day of December 1914.

145 Mr. Nixon continued his testimony as follows:

“A corporation incorporated under the laws of one of the states of the United States, one-third or more of whose issued share capital has been since August 4, 1914, held by or on behalf of persons who were subject of or residents or carrying on business in a state for the time being at war with Great Britain, comes within the definition of an enemy company in the Alien Enemies’ (Winding-up) Ordinance, No. 29 of 1914, with the various amendments which are incorporated in defendants’ Exhibit No. 1, for the purpose of this Ordinance and this Ordinance only. Assuming that the property of this American corporation had been vested as a matter of fact by a vesting order entered pursuant to the various Trading with the Enemies’ Ordinances in the Straits Settlements as to the Custodian of enemy property, leaving out of the question whether there was the right to vest in the Custodian of enemy property or not, an American corporation whose property had been so vested and 50% of its stock was owned by citizens or subjects of countries at war with Great Britain and coming into the Straits Settlements might make application to an official or a court and could secure the return of that property. Such a state of facts would not have justified under the laws of the Straits Settlements the vesting of that property as enemy property and therefore the Custodian would have no legal right to have that property and would be subject to an ordinary suit to return it. There is a possibility that the crown itself in the Straits Settlements, and this is a point which I think has not been decided, but there is a possibility that the crown itself by reason of wrongful possession and vesting in its officer, the Custodian of Enemy Property, would be subject to suit under the special law of the Straits Settlements which gives an opportunity for relief against the crown and which does not obtain in some other parts of the British Empire. It is not a matter of statute. If a wrong
146 is done by an officer under the English law and particularly under the laws of the Straits Settlements and they are in possession or have taken possession of property without legal authority, it is a common and general rule of the Straits Settlements and of the British Em-

pire generally that they shall get their property back. Officials are subject to what is known under our constitutional law as a rule of law and they cannot maintain that. In Ordinance No. 5 of 1916, which is called 'Ordinance to Amend the Trading with the Enemy Ordinance of 1914,' and this is known as the Trading with the Enemy Amendment Ordinance of 1916, there is a definition of enemy subjects which says: 'Enemy subject means a subject of a state for the time being at war with His Majesty and includes a body corporate constituted according to the laws of such state.' That would be a corporate body constituted by the laws of a state then an enemy of the English Crown and in a proclamation dated September 14, 1915, relating to trading with the enemy this was proclaimed by the crown (and the witness read the proclamation) so my answer to your question is that if a corporation were carrying on business in enemy territory it would be subject to have its property vested under the Trading with the Enemy Ordinances and if it were incorporated under the laws of an enemy state or nation it would be so subject under the other provisions. I know of no condition in the "Alien Enemies' (Winding-up) Ordinance" which provides for the appointment of a liquidator to wind up the company. Paragraph 4 of that ordinance has nothing to do with your question. You asked me as to whether a liquidator could be appointed to wind up the company, and my answer is 'no.' Paragraph 4 gives authority under certain circumstances to appoint a liquidator to

147 wind up the trade carried on in the Straits Settlements by certain defined bodies of persons. If a corporation organized under the laws of one of the states of the United States was engaged in trade in the Straits Settlements and had a large amount of assets there and came within the definition of 'enemy country' as used in this act, the Governor of the Straits Settlements under the laws of the colony could appoint a liquidator to wind up the affairs of the trade in the Straits Settlements. As far as this Alien Enemies' (Winding-up) Ordinance is concerned it is equally applicable to corporations organized outside of the Straits Settlements if those corporations are trading in the Straits Settlements and come

within the definition of "enemy company." It says enemy company means a company. There is no limitation to companies organized under the laws of the Straits Settlements and to make that quite clear it says even despite the fact that the company be organized under the laws of some part of his Britannic Majesty's dominions, and certainly if the British company were included there would not be an exception in favor of a foreign or neutral company.

"If an American corporation organized under the laws of one of the United States falls within the definition of enemy company as used in that ordinance and has assets and trade in the Straits Settlements, the Governor acting under that ordinance may appoint a liquidator for that firm and the liquidator may wind up the trade in the Straits Settlements after paying various charges against the trade, which are referred to in the statute, and the liabilities, he will then pay those assets, what is left, the money, over to the custodian of enemy property in the Straits Settlements, if there is any."

Q. And the custodian must then hold that money until the end of the war, or subject to such orders as the Governor may make, which generally speaking are orders for the payment of the debts owing by the enemy, out
148 of the property, is not that right? A. Well, I do not know about your last condition. But generally speaking the section says, except so far as the Governor or the Supreme Court or a judge thereof may otherwise direct, and subject to the provisions of subsection 2.

"An American company which falls with the meaning of enemy company in the winding-up ordinance and has a trade and assets in the Straits Settlements, and the Governor appoints liquidators for that trade and assets and the the liquidators proceed to wind up that trade and find themselves with some money in their hands as a result of winding up under that statute, and they paid under this statute to the custodian of enemy property in the Straits Settlements, and under those circumstances the American company by its duly authorized representative comes to the Straits Settlements and seeks to have paid over to it that money which is in the hands or in the custody of the custo-

dian of enemy property, whether it would secure that money would depend upon what the Governor in council might by order direct. I know of no limitation on the Governor by the law of the Straits Settlements as to what can be done with this money. The Governor in council is given authority to deal with the property. When you say he might give it to anybody he chose, of course, the Governor in council would never have the right to give it to any friend just because he was a friend. I do not know whether any American corporation has applied under those circumstances. There is nothing in these laws that says
149 whether an American corporation under those circumstances could secure the return of its money from the custodian of enemy property. The Governor would have authority to return it to the American corporation. I know of no proclamations or statutes or cases dealing with that subject. I can read no implication from the winding-up ordinance forbidding the return of money in the possession of the custodian of enemy property to corporations, one-third of whose stockholders are enemies or enemy subject. It is not at the caprice of the Governor as to whether or not this may be returned. The Governor is an officer holding a responsible position and he can carry out a policy and that policy would be determined by the facts placed before him. And far from any caprice, because any such matter makes him subject to instructions in those things, and if he receives certain instructions to carry out a line of policy he has the authority to do it. And you asked me as to the implication from this ordinance. Now, there is something in the ordinance that suggests an implication contrary to the one you have suggested, that is, in sub-section 9 of Section 4 it says:

“Every such winding-up shall, subject to the just rights of any other persons, be carried out as for the benefit of the persons entitled to the profits of such trade.”

Now there is a justified intimation that the liquidator shall bear in mind in doing this thing that he is doing it for the benefit of the persons entitled to the property. Of course, he could not pay out anything to subjects at war with Great Britain. He would not equally be paying out to an enemy

if he paid out to an enemy company within the meaning of that statute.

150 “You are dealing with the Trading with the Enemy Ordinance. This ordinance does not deal with the meaning of ‘enemy’ under the ordinances dealing with the trading with the enemy. It would not follow that because the proclamation which I read you defined it so merely because a certain proportion of the stockholders wish payment of money to such corporation, it would not come within this definition of enemy for the purpose of defining what constitutes trading with the enemy or paying money to the enemy.” The instructions to the Governor would be given by the Crown. I do not know of any instructions being given to the Governor on that subject. I have examined the records, but there might be records that are not available. They might not be made public. The return to an American corporation of this sort might be within the class not made public. I have not found any instructions dealing one way or the other.”

This completed the cross-examination of Mr. Nixon by Mr. Stanley.

151 On reexamination by Mr. Kresel Mr. Nixon testified as follows:

“The questions that Mr. Stanley put to me hypothetically did not contain the assumption that the seizure in the Straits Settlements was a wrong procedure. Assuming that an American company having property in the Straits Settlements had such property seized by the custodian in the Straits Settlements when under the laws of the Straits Settlements such seizure was wrongful, an American company under those circumstances could certainly go into the Straits Settlements courts and recover the property. Assuming the state of facts put to me by Mr. Stanley and assuming also that the original seizure was wrongful, there is no doubt at all in my mind that the Governor would under such circumstances return at least the balance that remained.”

On recross-examination by Mr. Stanley Mr. Nixon testified as follows:

“The custodian of enemy property would make the seizure under the Alien Enemy Ordinance. There is a provision in Ordinance No. 4 of 1915 by which the office of the custodian of enemy property may take property. There is a provision in Section 10 by which on application of the custodian an order may be made to vest property belonging to an enemy in the custodian. In the 1916 Ordinance, No. 5, there is another power giving to the Governor in council the right to vest in the custodian property or money belonging to an enemy. Of course, they cannot vest property at large.

152 “Ordinance No. 4, 1915, Section 10, says:

“The Supreme Court or a judge thereof may, on the application of any person who appears to the court to be a creditor of an enemy or entitled to recover damages against an enemy, or to be interested in any property, real or personal (including any rights, whether legal or equitable, in or arising out of property real or personal) belonging to or held or managed for or on behalf of an enemy, or on the application of the custodian or any Government Department, by order vest in the custodian any such real or personal property as aforesaid, if the court or the judge is satisfied that such vesting is expedient for the purposes of this ordinance, and may by the order confer on the custodian such powers of selling, managing and otherwise dealing with the property as to the court or judge may seem proper. Under that section and section 5 of Ordinance No. 5 of 1916, supposing that the property of an American corporation, more than 50% of whose capital stock was owned by subjects of countries at war with Great Britain, had property in the Straits Settlements and under one or the other of these sections that property was vested in the custodian of enemy property, such a corporation could secure the return of that property from the custodian of enemy property.”

Q. In other words, under your statement, the laws of the Straits Settlements put in a condition as to the stock ownership of a corporation when it is dealing with the subject

of return of property? A. You are too broad. You
153 asked me whether under these sections, and I answered you yes. And you changed to the laws of the Straits Settlements at large. My answer is that under the circumstances you stated, and those circumstances being the only circumstances present, that if property had been vested, under either of these sections of the trading with the enemy ordinances, it could have been obtained by the corporation owning it.

“Such an American corporation could not get its property, for example, if it was doing business in Germany. It does not matter if its entire board of directors resides in Germany or a majority of them so long as it is not doing business in Germany. That is the only limitation then under my view of it that there would be of an American corporation securing a return of its property from the custodian of enemy property in the Straits Settlements.”

This completed the prima facie case of the plaintiffs Behn, Meyer & Company, Ltd., in Equity 40361.

154 Thereupon on behalf of the plaintiffs in Equity No. 45881 Mr. Gordon placed in evidence certain exhibits as follows:

Liquidators' Exhibit No. 1, Certificate of Incorporation of Behn, Meyer & Company, Ltd., under the laws of the Straits Settlements, in words and figures as follows:

Certificate of Incorporation of Behn Meyer & Co., Limited.

I Charles Eugene Velge the Registrar of the Supreme Court Singapore hereby certify that Behn Meyer & Co., Limited, is this day registered and incorporated under “The Companies' Ordinance 1889” and that this Company is Limited.

Given under my hand this 11th day of December, 1905.

(S.)

C. E. VELGE,

Registrar of Joint Stock Companies, Singapore.

155 Liquidators' Exhibit No. 2, a certified copy of memorandum and Articles of Association of Behn, Meyer & Company, Ltd., in words and figures the same as

in Behn, Meyer & Company, Ltd., Exhibit No. 11, admitted in Equity No. 40361, the material parts of which have heretofore been included in this statement of evidence.

Liquidators' Exhibit No. 3, a certificate showing that on February 5, 1907, Behn, Meyer & Company, Ltd., a corporation organized and existing under the laws of the Straits Settlements with Memorandum and Articles of Association in words and figures as in Liquidators' Exhibit No. 2, and Behn, Meyer & Company, Ltd., Exhibit No. 11, was licensed to engage in such business in the Philippine Islands as the said corporation is authorized to do under its charter.

Mr. Gordon then introduced as Liquidators' Exhibit No. 4 in evidence a statement from the office of the Alien Property Custodian handed him by Mr. Stanley as follows:

Alien Property Custodian

Statement of Assets, All in Cash, Held by the Alien Property Custodian as a Result of the Liquidation of Behn, Meyer & Company, Ltd., Manila, P. I.

Trust.	In name of	Amount.
50219	Behn, Meyer & Co., Ltd., Sandakan, British North Borneo.....	\$2,844.43
50235	Behn, Meyer & Co., Ltd., Java, Dutch East Indies	17,014.66
50236	Behn, Meyer & Co., Ltd., Bangkok, Siam	91.45
50238	Behn, Meyer & Co., Ltd., Singapore, Straits Settlements	261,175.47
50240	Arnold Otto Meyer, Hamburg, Germany	216,563.71

156 In connection with this exhibit it was agreed between Mr. Gordon and Mr. Stanley that everything on the exhibit was taken from Behn, Meyer & Company as its own property with the exception of \$216,563.71 in Trust 50240 which was taken from Behn, Meyer & Company as being the money of Arnold Otto Meyer. Upon objection by Mr. Kresel this exhibit was admitted as against the defendants but not as against the plaintiff in Equity 40361.

Mr. Gordon then introduced in evidence as Liquidators' Exhibit No. 5 a certificate of the Registrar of Joint Stock

Companies of the Straits Settlements showing the persons holding shares in Behn, Meyer & Company, Ltd., on September 19, 1914, in words and figures substantially the same as Behn, Meyer & Company, Ltd., Exhibit No. 1, introduced by Mr. Kresel in Equity 40361.

Mr. Gordon then introduced in evidence as Liquidators' Exhibit No. 6 certified copies of certain certificates as follows:

(a) An undated certificate in words and figures as follows:

"I, Sir Arthur Henderson Young, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Governor and Commander-in-Chief of the Colony of the Straits Settlements and its Dependencies, do hereby certify that in my opinion Behn, Meyer and Company Limited is an enemy company as defined in 'The Alien Enemies (Winding-up) Ordinance, 1914.'

(Sgd.)

ARTHUR YOUNG,
Governor."

157 (b) A certificate dated January 2, 1915, in words and figures as follows:

"Whereas by the fourth section of 'The Alien Enemies (Winding-up) Ordinance, 1914,' it is enacted amongst other things that the Governor may appoint any person whom he may think fit as liquidator to wind up the affairs of any trade carried on in the Colony by an enemy company:

"And whereas by the third section of the aforesaid Ordinance it is enacted that a certificate under the hand of the Governor that in his opinion any company is or was an enemy company shall be conclusive evidence that such company is or was an enemy company:

"And whereas the Governor has issued a certificate under his hand that in his opinion Behn Meyer and Company Limited is an enemy company:

"And whereas it is expedient that the trade carried on by the said Behn Meyer and Company Limited should be wound up:

"Now I, Sir Arthur Henderson Young, Knight Commander of the Most Distinguished Order of Saint Michael

and Saint George, Governor and Commander-in-Chief of the Straits Settlements and their Dependencies, in pursuance and exercise of every power and authority enabling me in that behalf do appoint William Harvey MacGregor, Esquire, of Singapore, to be liquidator to wind up the affairs of the trade carried on by Behn, Meyer and Company, Limited.

“Dated this second day of January, 1915.

(Sgd.)

ARTHUR YOUNG,

Governor.

(Sgd.) R. J. WILKINSON,

Colonial Secretary, Straits Settlements.”

158 (c) A certificate dated February 16, 1924, showing the appointment by the Governor of the Straits Settlements of Evatt & Company, Singapore, to be liquidators from that date “to wind up the affairs of the trade carried on in this colony by the said Behn, Meyer & Company, Ltd., Singapore.”

(d) A certificate showing the appointment by the Governor of the Straits Settlements on November 12, 1924, of Charles Vernon Bailey and Sydney Whitaker to be liquidators in the place of Evatt & Company “to wind up the affairs carried on in this colony by the said Behn, Meyer & Company, Ltd., and that either of them, the said Mr. Charles Vernon Bailey and Mr. Sydney Whitaker, shall have power to act alone in the said winding-up for any of the powers or purposes exercisable by a liquidator under the Alien Enemies (Winding-up) Ordinance, 1914, or any of the amending ordinances thereto.”

159 **James Arthur Clarke**, called as a witness on behalf of the plaintiff, Behn, Meyer & Company, Ltd., in Equity No. 45881, being first duly sworn testified as follows:

“I live in Singapore in the Straits Settlements, a British Crown colony. I am a subject of Great Britain. I went to the Straits Settlements in or about October, 1913. I am a chartered accountant, that is, a member of the Institute of Chartered Accountants in England and Wales. The requirements for membership are when one passes a preliminary examination or is exempted, one is articulated to a

chartered accountant for a period of five years, and during that time he passes an intermediate examination and then a final examination, and then one is admitted. There is no other order of accountants that is considered higher than the one that I am in. I think I became a member in 1911 or 1912. When I went to Singapore first I was an assistant with the firm of Evatt & Company who were accountants and auditors. I am now a member of the firm. When I went to the Straits Settlements this firm were auditors for Behn, Meyer & Company, Ltd. When I first went there I assisted on the audit of Behn, Meyer & Company under the supervision of one of the partners. The business of Behn, Meyer & Company required a continuous audit. There was someone of Evatt & Company on the affairs of Behn, Meyer & Company practically, I should say, throughout the year. I was there a considerable portion of the time. I think I have spent probably at any rate two months during the year at least. Evatt & Company would
160 report annually on the balance sheets submitted to the stockholders. This report required study of the figures which made up the balance sheet. The company had a head office at Singapore. It had a branch at Penang, Straits Settlements, branches at Batavia, at Semarang and Sourabaya in the Dutch East Indies, Sandakan, British North Borneo, Bangkok, Siam, Manila, Cebu, Samboanga and Ilo-Ilo in the Philippine Islands, Teluk-Betong, Sumatra, and a branch for the sale of machinery at Kuala-Lumpur, Federated Malay States. They had no other branches to my knowledge. William Harvey MacGregor was a British subject and merchant who resided in Singapore. The present members of Evatt & Company are Charles Vernon Bailey and James Arthur Clarke. From February 16, 1924, to March 31, 1924, the partners were Humphrey Basil Ward, Charles Vernon Bailey and Sydney Whitaker. From March 31, 1924, to March 31, 1926, the partners were Charles Vernon Bailey, Sydney Whitaker and James Arthur Clarke. From March 31, 1926, to the present they were Charles Vernon Bailey and James Arthur Clarke. All of these gentlemen lived in the Straits Settlements. They were chartered accountants and British subjects. During the whole period down to the present time I have never heard of Behn, Meyer & Company, Ltd., doing business except in the places that have been stated."

Mr. Gordon then offered in evidence as exhibit 7 a document, the signatures to which were proved by Mr. Clarke, in words and figures as follows:

Alien Enemies (Winding-up) Ordinance, 1914.

Whereas in pursuance of the power conferred on him by the above mentioned Ordinance, His Excellency Sir
161 Laurence Nunns Guillemard, Knight Commander of the Most Honourable Order of the Bath, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Governor and Commander-in-Chief of the Straits Settlements and their Dependencies, appointed on the 12th day of November, 1924, Mr. Charles Vernon Bailey and Mr. Sydney Whitaker then partners in the firm of Messrs. Evatt and Company of Singapore to be liquidators to wind up the affairs of the trade carried on in the Colony by Behn Meyer and Company Limited, Singapore.

And whereas it is desirable to revoke the aforesaid appointment and appoint new liquidators in their place.

Now I, Sir Laurence Nunns Guillemard, Knight Commander of the Most Honorable Order of the Bath, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Governor and Commander-in-Chief of the Straits Settlements and their Dependencies, in pursuance of every power and authority enabling me in that behalf hereby revoke the aforesaid appointment as from the 20th day of April, 1926, and do appoint Mr. Charles Vernon Bailey and Mr. James Arthur Clarke both of French Bank Building Singapore Chartered Accountants, partners in the firm of Evatt and Company to be liquidators from that date to wind up the affairs of the trade carried on in this Colony by the said Behn Meyer and Company Limited and that either of them the said Mr. Charles Vernon Bailey and Mr. James Arthur Clarke shall have power to act alone in the said winding up for any of the powers or purposes exercisable by a liquidator under the
162 Alien Enemies (Winding-up) Ordinance 1914 or any of the amending Ordinances thereto.

L. N. GUILLEMARD,
Governor and Commander-in-Chief,
By His Excellency's Command.

Given at Singapore this 20th day of April, 1926.

MARRIOTT,
Colonial Secretary, Straits Settlements.

Mr. Clarke continued his testimony as follows:

“I am the same Mr. Clarke that is named in this paper. Charles Vernon Bailey and I are still liquidators of Behn, Meyer & Company and there has been no revocation of our appointment. We have given no authority to Emil W. Martens to institute any action in behalf of Behn, Meyer & Company, Ltd. To my knowledge no authority has been given by any of the previous liquidators. Neither the present liquidators nor any of the former liquidators to my knowledge have ever authorized any meetings or any action of any kind by the former directors of Behn, Meyer & Company, Ltd. My firm not only acted as accountants for Behn, Meyer & Company, Ltd., before the original liquidation in 1914 but have continued to act as accountants for the successive liquidators after they were appointed. After the appointment of Mr. MacGregor as liquidator he entered upon the performance of his duties as such liquidator. After the revocation of his appointment and the appointment of Evatt & Company they entered upon the performance of their duties as such liquidator. After the
163 revocation of the appointment of Evatt & Company and the appointment of Bailey and Whitaker they entered upon the performance of their duties as such liquidators. After the revocation of their appointment and the appointment of Messrs. Clarke and Bailey as liquidators of Behn, Meyer & Company they entered upon the performance of their duties as such and are still exercising their duties as liquidators. The first order declaring Behn, Meyer & Company an enemy (Liquidators’ Exhibit 6) was made on the 17th or 18th of December, 1914, or early in January, 1915. It was prior to the appointment of Mr. Macgregor, and I think it was on the 17th or 18th of December, 1914.”

This completed Mr. Clarke’s direct examination. Upon cross-examination by Mr. Stanley he testified as follows:

“I was familiar with Behn, Meyer & Company, Ltd., quite a period prior to the outbreak of the great war. I probably knew the directors and was familiar with the

affairs of the company. I knew Mr. Diehn. At some period after the outbreak of the war he was interned as a prisoner of war, in the prisoners of war camp. I cannot say definitely whether Mr. Diehn performed any duties with respect to the company after the outbreak of the war between Great Britain and Germany. There may have been a short period that he did. He did not perform any duties with respect to Behn, Meyer & Company, Ltd., in Singapore or in the Straits Settlements after his internment as a prisoner of war. I think I probably knew

164 Mr. Schoenberg but I cannot say definitely. I knew so many people in Behn, Meyer & Company, Ltd., that I cannot say definitely as to Mr. Schoenberg. I was not there for a great time, from perhaps 1913 until the outbreak of the war in August, 1914, but I probably did know him. I do not think there were any directors' meetings held at the outbreak of the war at which these various directors were present. It is possible that there was a meeting held subsequent to the outbreak of the war and before their internment. The internment would take place shortly after the outbreak of the war, and I cannot say definitely when the internment did occur. After the appointment of the first liquidator there was no meeting of the board of directors. As far as I know from the time of the appointment of the first liquidator in the Straits Settlements down to the present time there has never been a meeting of the board of directors of Behn, Meyer & Company, Ltd., in the Straits Settlements. So far as I know no meetings of stockholders were held either in Singapore or elsewhere up to the date of my leaving the Straits Settlements, which was the 19th of November, 1926. The liquidators would not report to the directors. I have not in my capacity as liquidator made any report to such directors or in any way recognized any such persons as my official superiors or as in any way having any authority over me. No order of dissolution has been made by the Governor of the Straits Settlements for Behn, Meyer & Company, Ltd., under Section 6 of the Alien Enemies' (Winding-up) Ordinance. I have not made an final

165 report. The liquidation has not been finally completed. With the exception of the assets which are

involved in this litigation the liquidators have not completed the winding-up of the trade of Behn, Meyer & Company, Ltd. The present liquidators have not paid over any money which has come into their hands to the custodian of enemy property in the Straits Settlements up to the present time. Mr. MacGregor paid over certain money. As far as money in the Straits Settlements is concerned this has been paid over to the custodian."

This completed the cross-examination by Mr. Stanley. Upon cross-examination of Mr. Kresel Mr. Clarke testified as follows:

"I personally had nothing to do with the business of Behn, Meyer & Company before 1913. In 1913 I assisted on the audit of the whole year of the accounts of Behn, Meyer & Company in Singapore and elsewhere. Behn, Meyer & Company had their own bookkeepers. The work that we did in the early part of 1914 was in the nature of auditing work. I am a member of the organization of Chartered Accountants. One of the rules of ethics of that profession is to keep confidences. In doing this accounting work for Behn, Meyer & Company we were in a confidential relation to that company. I did not find anywhere on the books of Behn, Meyer any account of what goods the Philippine branches sold in 1913 and to whom they sold. There is nothing in any of the books of Behn, Meyer & Company in Singapore showing how much in outstanding accounts the Philippine branches had in 1913 or 1914 or in any other year, apart from such returns as would be rendered and made in accounts kept at Singapore.

166 There was nothing on the books kept in Singapore to indicate how much merchandise the Philippine branches had on hand in 1913 or 1914 or any other year, apart from such returns as were rendered and incorporated or copied into the books kept at Singapore. There was nothing on the books kept in Singapore to indicate what cash the Philippine branches had on hand at any time unless they were sent up and incorporated in the books kept at Singapore. I cannot say definitely at what periods the Philippine branches sent an account to Singapore but we will say at least once a year. I do not have

any such accounts here with me. I cannot say absolutely that I saw any accounts that were sent up from the Philippines. I should not know without returns from the Philippines the names of the customers to whom the Philippine branches had sold goods on credit. If the liquidators had started out to collect any outstanding accounts which arose in the business of the Philippine Islands there was nothing in the records at Singapore which would tell us the name and address and the amount of such an account. As to the cash in hand I should not know what cash they had in hand in the Philippine branches. As to the cash at the banks, if the returns would be sent to the banks I would know what banks they had. I could tell from the records in Singapore what banks there were deposits in for the Philippine branches and how much these deposits were by reference to press copy books. I should be able to ascertain what banks there were, at what banks accounts were kept. I should know from reference to various other ledgers what certain other assets they had at the Philippine Islands, such as land, furniture, houses, and so on.

167 From that the liquidators would proceed to gather in such other information as they could and so collect the assets. If you are referring to the book debts, why that is another matter. By press copy books I mean copies of letters sent by Singapore to other branches or by other branches to Singapore. I think I saw in those copy books copies of reports made by the Philippine branches to Singapore. In fact I am almost certain, I am practically certain, I should say. I will probably have other books that would give information about the assets and liabilities of the Philippine branches. I cannot give you the details here because they are over at Singapore. The books of Behn, Meyer & Company would occupy a room as big as this court, or bigger. There are hundreds of books, I cannot tell you off-hand. I am saying that there were other books, what books I cannot say, nor can I remember the names of them, but there are others there which would no doubt give me information regarding the assets of the Philippine branch of Behn, Meyer & Company, Ltd. And I instanced that one book which has been brought over from Singapore. I cannot as I sit here tell you of any other book either by description or entry.

The copies that I saw in the copybook with reference to the Manila business were copies of balance sheets. I do not recollect that it would contain all details of the amounts owed and liabilities. It is very often true that a balance sheet does not give details unless there is supporting data. To the best of my recollection I am practically certain I saw these accounts from the returns sent in by the branches, in which would be stated the assets and liabilities. As to the details of these liabilities, as I pointed out before, they would not necessarily be shown. That is true as to the particulars of the debts. I do not have
168 any accounts rendered by any of the branches with me. I brought from Singapore the private ledger and the general ledger of the company and no other books or copies of books. The members of my firm have been liquidators of Behn, Meyer & Company, Ltd., since 1924. My compensation does not consist of a commission. I do not as liquidator get a commission of 3% to be fixed by the Governor on the total assets brought to the credit by the liquidator."

On redirect-examination Mr. Clarke testified as follows:

"Our remuneration as liquidators is fixed by the Government of the Straits Settlements and the rate agreed upon is based at \$100 a day of seven working hours. I have not the slightest interest in the outcome of the suit. My answer referred to Straits Settlements dollars, practically fifty cents of American money. It takes approximately eight days sailing from the Straits Settlements to the Philippines. It would be practically impossible for books to be kept in the Philippine branch of the business and simultaneously the same entries made at Singapore showing cash on hand at the Philippines at any minute, either assets or liabilities. It would be absolutely impossible on account of the distance. The Philippines kept their separate accounts and at periodical intervals they would report to the Straits Settlements the condition of their business. As to the dates of these reports to the people in the Straits Settlements, the records there would reflect the Philippine business, but in the meantime the people in the
169 Straits Settlements would not know exactly what had come in or gone out. I would think that it is a

general way of doing business not only there but all over the world, even in America. I got back some of the money which had been turned over by the liquidators to the custodian of enemy property. On occasions when we had to pay costs of advertising or a stationery bill or legal expenses or anything of that sort, we would make application to the custodian of enemy property for a return of some money and for the payment of debts. In my experience as an accountant I do not see any reason why as liquidator of Behn, Meyer & Company, appointed under the laws of the Straits Settlements, the domicile of the company, I should not give any testimony that is within my knowledge to aid in recovering funds that I consider due me as such liquidator. I am satisfied that I have not done anything that is subject of criticism."

On further examination by Mr. Stanley Mr. Clarke testified as follows:

"When I received funds from the custodian of enemy property for the purpose of meeting current bills I secured them by making application to the custodian, who would send me a check. I think these checks were drawn on the Chartered Bank of India, Australia and China. That was a bank doing business in the Straits Settlements and in all of the world. I think it was drawn on the account of the custodian. I cannot say definitely whether it would be marked "Behn, Meyer" or would be on the general account of the custodian, I am not absolutely certain. As liquidator since my appointment I have made such requisition on several occasions, yes many occasions. I do not know of any particular statute permitting the liquidator to draw
170 on the custodian of enemy property for funds. In the ordinary way of a liquidation according to the Straits Settlements law the liquidator is supposed to hand over to an official any balances remaining in his hands at the expiration of a certain time. If it subsequently is ascertained that there are other liabilities or other debts the liquidator would simply apply to the custodian or other official for the refund of that money in order to pay creditors' claims and all expenses. The moneys sent were handed over to the custodian by the previous liquidator, Mr. MacGregor. There were many claims against Behn,

Meyer & Company, Ltd., some of which were settled and some of which remained unsettled for lack of evidence as to proof, proof of nationality. The liquidator was leaving the colony, going on leave, and as the liquidation had not been finally settled the money was paid over by the liquidator to the custodian. I take it it would be a natural thing for him to do. He would not want the money himself. He would pay it over to the custodian if he was leaving the colony. No other liquidator had been appointed. Someone had to have the money. The liquidation had not been settled. The claims of creditors had not been admitted. I do not know of any instances of the liquidator withdrawing funds paid to the custodian of enemy property other than for the payment of liabilities of the company being liquidated, or rather the trade being liquidated, or for the current expenses of the liquidation. As far as the payment of liabilities and current expenses are concerned I as liquidator considered myself acting at all times under the provisions of the 11th and 12th subsections of paragraph 4 of the Winding-up Ordinance."

171 On redirect examination Mr. Clarke testified:

"I cannot say definitely myself whether the Governor actually did give directions to the liquidator to pay the money in to the custodian. I know that it was very likely. Whether he did or did not he would pay them in that way. If the Governor had given such directions I imagine that would have been authority within the statute."

Mr. Adolf Laspe was called as a witness for the plaintiff in Equity No. 45881 and gave certain testimony relating to the state of the accounts between Behn, Meyer & Company, Ltd., and Arnold Otto Meyer which is not material for the purposes of this appeal. At the conclusion of this testimony Mr. Gordon on behalf of the plaintiff in Equity 45881 asked leave to amend to ask for an accounting in the same way that the plaintiff had prayed in Equity 40361.

The Court stated: Have you any prayer for general relief?

Mr. Gordon: Yes.

The Court: Then I will construe that as a prayer for an accounting.

Mr. Gordon: All right.

172 **Howell Dawson Mundell** being called as a witness for the plaintiff, Behn, Meyer & Company, Ltd., in Equity No. 45881, being first duly sworn testified as follows:

(Mr. Mundell gave testimony in support of the contention of the plaintiff in Equity No. 45881 that under the laws of the Straits Settlements the liquidators by their appointment as such obtained authority to collect assets located outside of the Straits Settlements and was cross-examined by Mr. Kresel and by Mr. Stanley on this subject. As the plaintiff in Equity No. 45881 has not assigned as error the ruling of the trial court that the liquidators as such had no powers beyond the winding-up of the trade of Behn, Meyer & Company geographically located in the Straits Settlements, this testimony and some of the cross-examination thereto have become immaterial on this appeal and are therefore omitted from the statement of evidence. Only the testimony of Mr. Mundell relating to the issues to be raised on appeal is given.)

“I live in Singapore, Straits Settlements. I am an advocate and solicitor of the Straits Settlements and of the Federated Malay States and of the State of Jahore and am an English solicitor. There is no other sort of lawyer in the Straits Settlements than advocate and solicitor. I was born in England in 1883 and am a British subject. I was admitted to practice the end of 1904 or early in 1905 in England and practiced there until 1908, and then went to Singapore. I had to reside there six months before being admitted to practice in Singapore and was then admitted and have practiced there continuously except when I have made temporary visits to England. I have been a member of the firm of Sisson & Delay since March, 1912. Prior to that time I was an assistant with that firm. An advocate and solicitor under the Straits Settlements law is required to have knowledge of British law as well as the law particularly applicable to the Straits Settlements. Only English, Scotch or Irish barristers or solicitors are eligible for admission as advocates and solicitors of the Straits Settlements. I and my firm have been solicitors for Mr. MacGregor, the original

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liquidator of Behn, Meyer & Company. We gave him legal advice during the period from December 18, 1914, continuously through his period as liquidator. I, myself, was appointed liquidator under the Alien Enemies (Winding-up) Ordinance and we have had other clients who have been liquidators, including Messrs. Evatt & Company and partners. In connection with that work I have made a special study of the laws relating to the winding-up of alien enemy companies in the Straits Settlements and other laws of that sort long prior to the time that the case at bar arose. There is only one Behn, Meyer & Company, Ltd., in the Straits Settlements. The law does not permit two companies of the same name or of confusing names to be registered in the Straits Settlements."

174 Mr. Gordon then introduced in evidence on behalf of the plaintiffs in Equity No. 45,881, the following Ordinances of the Straits Settlements:

"The Trading with the Enemy (Amendment) Ordinance, 1915."

Ordinance IV of 1915.

"The Trading with the Enemy (Further Amendment) Ordinance, 1915."

Ordinance X of 1915.

"The Trading with the Enemy (Amendment) Ordinance, 1916."

Ordinance No. 5 of 1916.

"The Clearing Office Ordinance 1920."

Ordinance No. 18 of 1920.

"The Clearing Office (Amendment) Ordinance 1921."

Ordinance No. 7 of 1921.

Mr. Gordon also offered in evidence "The British Trading with the Enemy Acts, 1914-1918."

The material parts of the said Straits Settlements legislation are printed in the following pages.

175

Ordinance No. IV of 1915.

27th May, 1915.

An Ordinance to Amend "The Trading with the Enemy Ordinance, 1914," and for Purposes Connected Therewith.

1. This Ordinance may be cited as "The Trading with the Enemy (Amendment) Ordinance, 1915," and shall be construed as one with "The Trading with the Enemy Ordinance, 1914" hereinafter referred to as the principal Ordinance).

* * * * *

7. (1) The Governor shall appoint a person to act as custodian of enemy property (hereinafter referred to as "the custodian") for the purpose of receiving, holding, preserving and dealing with such property as may be paid to or vested in him in pursuance of this Ordinance.

(2) The custodian shall have such powers and duties with respect to the property aforesaid as may be prescribed by regulations made by the Governor in Council.

* * * * *

Power to Vest Enemy Property in Custodian. S. 4 of 5
Geo. V, c. 12.

10. (1) The Supreme Court or a Judge thereof may, on the application of any person who appears to the Court to be a creditor of an enemy or entitled to recover damages against an enemy, or to be interested in any property, real or personal (including any rights, whether legal or equitable, in or arising out of property real or personal), belonging to or held or managed for or on behalf of an enemy, or on the application of the custodian or any Government Department, by order vest in the custodian any such real or personal property as aforesaid, if the Court or the Judge is satisfied that such vesting is expedient for the purposes of this Ordinance, and may by the order confer on the custodian such powers of selling, managing and otherwise

dealing with the property as to the Court or Judge
176 may seem proper.

(2) The Court or Judge before making any order under this section may direct that such notices, if any, whether by way of advertisement or otherwise, shall be given as the Court or Judge may think fit.

(3) A vesting order under this section as respects property of any description shall be of the like purport and effect as a vesting order as respects property of the same description made under the Trustee Ordinance 1914.

177 Holding and Dealing with Property by Custodian.
S. 5 of 5 Geo. V, c. 12.

11. (1) The custodian shall, except so far as the Governor or the Supreme Court or a Judge thereof may otherwise direct, and subject to the provisions of subsection (2), hold any money paid to and any property vested in him under this Ordinance until the termination of the present war, and shall thereafter deal with the same in such manner as the Governor may by order in Council direct.

* * * * *

(4) The custodian shall keep a register of all property held by him under this Ordinance which register shall be open to public inspection at all reasonable times free of charge.

* * * * *

Invalidity of Transfers of Shares in Company, etc. S. 8
of 5 Geo. V, c. 12.

14. (1) No transfer made after the passing of this Ordinance by or on behalf of an enemy of any securities shall confer on the transferee any rights or remedies in respect thereof and no company or municipal authority or other body by whom the securities were issued or are managed shall, except as hereinafter appears, take any cognizance of or otherwise act upon any notice of such transfer.

(2) No entry shall hereafter, during the continuance of the present war, be made in any register or branch register or other book kept in the Colony of any transfer of any

securities therein registered, inscribed, or standing in the name of an enemy, except by leave of a court of competent jurisdiction or of the Governor.

(3) No share warrants payable to bearer shall be issued during the continuance of the present war in respect of any shares or stock registered in the name of any enemy.

178 (4) If any company or any body contravenes the
provisions of this section, the company or body shall
be liable to a fine not exceeding one thousand dollars,
179 and every director, manager, secretary or other offi-
cer of the company or body who is knowingly a
party to the default, shall be liable to a like fine or to im-
prisonment of either description for a term which may ex-
tend to six months.

(5) For the purposes of this section the expression "securities" means any annuities, stock, shares, debentures, or debenture stock issued by or on behalf of the Government or by any municipal or other authority, or by any company or by any other body which are registered or inscribed in any register, branch register, or other book kept in the Colony.

180

Ordinance No. X of 1915.

14th July, 1915.

An Ordinance to Extend Certain Provisions of the Trading with the Enemy (Amendment) Ordinance, 1915, to All Subjects of Any State at War with His Majesty.

1. This Ordinance may be cited as "The Trading with the Enemy (Further Amendment) Ordinance, 1915."

Section 7 to 11 of Ordinance IV of 1915 Applied to All
Enemy Subjects.

2. The provisions of sections 7 to 11 of the Trading with the Enemy (Amendment) Ordinance 1915 shall as from the date of the commencement of this Ordinance apply to any person of enemy nationality interned in the Colony or elsewhere and to any person or body of persons of enemy nationality wherever resident or carrying on business in the

same manner as they apply to persons or bodies of persons resident or carrying on business in the enemy country.

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No. 5 of 1916.

2nd May, 1916.

An Ordinance to Amend the Trading with the Enemy Ordinances, 1914 and 1915.

1. This Ordinance may be cited as the Trading with the Enemy (Amendment) Ordinance, 1916, and shall be construed as one with the Trading with the Enemy Ordinances, 1914 and 1915, and those Ordinances and this Ordinance may be cited together as the Trading with the Enemy Ordinances, 1914 to 1916.

Definition S. 15 of 5 & 6 Geo. V, c. 105.

2. In this Ordinance—

“Enemy subject” means a subject of a State for the time being at war with His Majesty, and includes a body corporate constituted according to the laws of such State.

* * * * *

Power of Governor in Council to Vest Enemy Property in Custodian. S. 4 of 5 & 6 Geo. V, c. 105.

5. (1) The Governor in Council, in any case where it appears to him to be expedient to do so, may by order vest in the custodian under the Trading with the Enemy (Amendment) Ordinance, 1915, any property, real or personal (including any rights whether legal or equitable, in or arising out of property, real or personal), belonging to or held or managed for and on behalf of an enemy or enemy subject, or the right to transfer that property, and may by any such order, or any subsequent order, confer on the custodian such powers of selling, managing and otherwise dealing with the property as to the Governor seem proper.

* * * * *

182 Duration of Restrictions on Dealings with Enemy Property. S. 7 of 5 & 6 Geo. V, c. 105.

6. Any restrictions imposed by any Ordinance or Proclamation on dealings with enemy property shall continue to apply to property particulars whereof are or are liable to be notified to the custodian in pursuance of section 9 of the Trading with the Enemy Amendment Ordinance 1915 as extended by any subsequent enactment, not only during the continuance of the present war, but thereafter until such time as they may be removed by Order of the Governor in Council, and Orders in Council may be made removing all or any of those restrictions either simultaneously as respects all such property or at different times as respects different classes or items of property.

Registration of Transfer Without Production of Certificates, etc. S. 8 of 5 & 6 Geo. V, c. 105.

7. (1) Where the custodian executes a transfer of any shares, stock, or securities which he is empowered to transfer by a vesting order made under section 10 of the Trading with the Enemy (Amendment) Ordinance, 1915, or under this Ordinance, the company or other body in whose books the shares, stock, or securities are registered shall, upon the receipt of the transfer so executed by the custodian, and upon being required by him so to do, register the shares, stock, or securities in the name of the custodian or other transferee, notwithstanding any regulation or stipulation of the company or other body, and notwithstanding that the custodian is not in possession of the certificates, scrip, or other document of title relating to the shares, stock or securities transferred, but such registration shall be without prejudice to any lien or charge in favour of the company or other body or to any other lien or charge of which the custodian has notice.

* * * * *

183 Validity of Vesting Orders. S. 9 of 5 & 6 Geo. V, c. 105.

8. Where a vesting order has been made under section 10 of the Trading with the Enemy (Amendment) Ordinance,

1915, or under this Ordinance as respects any property belonging to or held or managed for and on behalf of a person who appeared to the Court or Governor in Council making the order to be an enemy or enemy subject, the order shall not nor shall any proceedings thereunder or in consequence thereof be invalidated or affected by reason only of such person having prior to the date of the order died or ceased to be an enemy or enemy subject or subsequently dying or ceasing to be an enemy or enemy subject, or by reason of its being subsequently ascertained that he was not an enemy or an enemy subject as the case may be.

* * * * *

10. (2) No allotment or transfer of any share, stock, debenture, or other security issued by a company made after the passing of this Ordinance to or for the benefit of an enemy subject, shall, unless made with the consent of the Governor in Council, confer on the allottee or transferee any rights or remedies in respect thereof, and the company by whom the security was issued shall not take any cognizance of or otherwise act upon any notice of any such transfer except by leave of a court of competent jurisdiction or of the Governor in Council.

184

No. 18 of 1920.

An ordinance to establish in accordance with the order in Council of 18th August, 1919, a local clearing office to give effect to certain provisions of the treaty of peace between the Allied and Associated Powers and the Central Powers.

[27th August, 1920.]

1. This Ordinance may be cited as the Clearing Office Ordinance, 1920.

* * * * *

3. The provisions of the Order in Council of 18th August, 1919 shall apply to the Colony subject to the following modifications:

* * * * *

(b) In Article I (XVII) (b) the words “unless particulars thereof have been furnished to the Custodian in accordance with the Trading with the Enemy Acts, 1914 to 1918” are replaced by the words “unless such particulars as the Custodian has required or shall require have already been furnished to him.”

(c) In Article I (XVII) (c) the words “subject to the consent of the Board of Trade” are replaced by the words “subject to the consent of the Governor in Council.”

(d) In Article I (XVII) (d) the words “the Board of Trade” are replaced by the words “the Governor in Council” and the words “and for that purpose section four of the Trading with the Enemy (Amendment) Act, 1916, shall apply” are replaced by the words “and for that purpose section five of the Trading with the Enemy (Amendment) Ordinance, 1916, shall apply.”

185 *Clearing Office (Amendment) 7 of 1921.*

Straits Settlements.

No. 7 of 1921.

L. E. J. W. Murison, Governor's Deputy.

6th April, 1921.

An Ordinance to Amend the Clearing Office Ordinance, 1920.

(8th April, 1921.)

It is hereby enacted by the Governor of the Straits Settlements with the advice and consent of the Legislative Council thereof as follows:

1. This Ordinance may be cited as the Clearing Office (Amendment) Ordinance, 1921, and shall be read and construed as one with the Clearing Office Ordinance, 1920, hereinafter called “the principal Ordinance.”

2. The provisions of His Majesty's Order in Council of the 28th day of June, 1920, cited as the Treaty of Peace (Amendment) Order, 1920, shall, with the modifications hereinafter set out, apply to the Colony, and shall be read as amending the Order of His Majesty in Council of the

18th day of August, 1919, cited as the Treaty of Peace Order, 1919, as modified by section 3 of the Clearing Office Ordinance, 1920.

3. The Treaty of Peace (Amendment) Order, 1920, in its application to the Colony is modified as follows:

(a) The words "Governor in Council" are substituted for the words "Board of Trade" or "President of the Board of Trade" wherever the same occur in the proviso to Clause 2 or in the Schedule, except in paragraph (XIV A) of Article I thereof.

186 4. Section 3 (d) of the principal Ordinance is amended by deleting the words "section five" occurring in line 7 thereof and substituting therefor the words "sub-sections (1) to (4) of Section 5."

* * * * *

6. There shall be printed with this Ordinance, the Treaty of Peace Order, 1919, together with the Schedule attached thereto, and the Treaty of Peace (Amendment) Order, 1920, together with the Schedule attached thereto.

* * * * *

At the Court, at Buckingham Palace, the 18th Day of August, 1919.

Present: The King's Most Excellent Majesty in Council.

Whereas at Versailles on the twenty-eighth day of June, nineteen hundred and nineteen, a Treaty of Peace (hereinafter referred to as "the Treaty") was signed on behalf of His Majesty:

And whereas by the Treaty of Peace Act, 1919, it was provided that His Majesty might make such appointments, establish such offices, make such Orders in Council and do such things as appeared to him to be necessary for carrying out the Treaty, and for giving effect to any of the provisions of the Treaty, and that any Order in Council made under that Act might provide for the imposition by summary process or otherwise of penalties in respect of breaches of the provisions thereof:

And whereas the Treaty contained the Sections set out in the Schedule to this Order, and it is expedient that for

giving effect to those sections the provisions hereinafter contained should have effect:

187 And whereas by Treaty grant usage sufferance or other lawful means His Majesty has power and jurisdiction in British Protectorates, and is pleased by virtue and in exercise of the powers vested in Him by the Foreign Jurisdiction Act, 1890, or otherwise to extend the provisions of this Order to such Protectorates:

Now, therefore, His Majesty, by and with the advice of His Privy Council, is pleased to order, and it is hereby ordered, as follows:

1. The Sections of the Treaty set out in the Schedule to this Act shall have full force and effect as law, and for the purpose of carrying out the said Sections the following provisions shall have effect:

(i) There shall be established in the United Kingdom a Clearing Office under the control and management of such person (hereinafter referred to as appoint for the purpose, and there shall be attached thereto such officers and servants as the Board of Trade, subject to the consent of the Controller) as the Board of Trade may *Treasury as to number, may* determine, and there shall be paid to the Controller and to such officers and servants such salaries or other remuneration as the Treasury may determine.

In the event of a local office being established in any part of His Majesty's dominions outside the United Kingdom or in any Protectorate, the provisions relating to the Clearing Office hereinafter contained shall apply thereto for the pur- of the functions authorized to be performed by a local Clearing Office under paragraph I of the Annex to Section III of Part X of the Treaty.

* * * * *

188 (XVI). All property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty comes into force (not being property rights or interests acquired under any general licence issued by or on behalf of his Majesty), and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged—

(a) in the first place, with payment of the amounts due in respect of claims by British nationals with regard to

their property, rights and interest, including companies and associations in which they are interested in German territory, or debts owing to them by German nationals, and with payment of any compensation awarded by the Mixed Arbitral Tribunal, or by an Arbitrator appointed by that Tribunal in pursuance of paragraph (c) of Article 297, and with payment of claims growing out of acts committed by the German Government or by German authorities since the thirty-first day of July, and before the fourth day of August, nineteen hundred and fourteen; and

(b) secondly, with payment of the amounts due in respect of claims by British nationals with regard to their property, rights and interests in the territories of Austria-Hungary, Bulgaria and Turkey, in so far as those claims are not otherwise satisfied.

189 Provided that any particular property, rights or interest so charged may at any time, if His Majesty thinks fit, be released from the charge so created.

(xvii) With a view to making effective and enforcing such a charge as aforesaid—

(a) no person shall, without the consent of the Custodian, transfer, part with or otherwise deal in any property, right or interest subject to the charge, and if he does so he shall be liable on summary conviction to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding three months or to both such imprisonment and fine;

(b) every person owning or having the control or management of any property right or interest subject to the charge (including where the property right or interest consists of shares stocks or other securities issued by a company municipal authority or other body or any right or interest therein such company authority or body) shall, unless particulars thereof have already been furnished to the Custodian in accordance with the Trading with the Enemy Acts, 1914 to 1918, within one month from the date when this Order comes into operation by notice in writing communicate the fact to the Custodian and shall furnish the Custodian with such particulars in relation thereto as the Custodian may require, and if any person fails to do so he shall on summary conviction be liable to a fine not exceeding one hundred pounds;

190 (c) where the property charged consists of inscribed or registered stock, shares or other securities, any company, municipal authority or other body by whom the securities were issued or are managed shall, on application being made by the Custodian, enter the Custodian in the books in which the securities are inscribed or registered as the proprietor of the securities subject to the charge, and the Custodian shall, subject to the consent of the Board of Trade, have power to sell or otherwise deal with the securities as proprietor of which he is so registered or inscribed;

(d) the Board of Trade may by order vest in the Custodian any property, rights and interest subject to the charge, or the right to transfer the same, and for that purpose section four of the Trading with the Enemy (Amendment) Act, 1916, shall apply as if such property, rights and interests were property belonging to an enemy or enemy subject;

(e) if any person called upon to pay any money or to transfer or otherwise to deal with any property rights or interests has reason to suspect that the same are subject to such charge as aforesaid he shall before paying transferring or dealing with the same report the matter to the Custodian and shall comply with any directions that the Custodian may give with respect thereto.

* * * * *

191 2. For the purposes of this Order—

The expression “enemy debt” has the meaning assigned to it by paragraph 2 of the Annex to Section III of Part X of the Treaty, and includes any sum which under the Treaty is to be treated or dealt with in like manner as an enemy debt:

The expression “nationals” in relation to any State includes the subjects or citizens of that State and any company or corporation incorporated therein according to the law of that State and in the case of a Protectorate the natives thereof:

The expression “Custodian” means the Custodian of enemy property appointed under the Trading with the Enemy (Amendment) Act, 1914.

* * * * *

The Interpretation Act, 1889, applies for the interpretation of this Order in like manner as it applies for the interpretation of an Act of Parliament, and as if this Order were an Act of Parliament.

3. This Order shall apply to the whole of His Majesty's Dominions and Protectorates, except the Dominion of Canada, the Commonwealth of Australia (which for this purpose shall be deemed to include Papua and Norfolk Island), the Union of South Africa, the Dominion of New Zealand, Newfoundland and India, but in its application to the parts of His Majesty's Dominions outside the United Kingdom and to British Protectorates shall be subject to such modifications as may be made by the legislatures of those parts of those Protectorates for adapting to the circumstances thereof the provisions of this Order.

* * * * *

192 5. This Order may be cited as the Treaty of Peace Order 1919.

193 * * * * *

(The Schedule contains Sections III to VII, inclusive, of Part 10 of the Treaty of Versailles, the material parts of which are as follows:)

Section IV.—Property, Rights, and Interest.

Article 297.

The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this section and to the provisions of the Annex hereto:

* * * * *

(b) Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights, and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty.

The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights, or interests nor to subject them to any charge without the consent of that State.

* * * * *

(d) As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and
194 binding upon all persons except as regards the reservations laid down in the present Treaty.

(e) The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights, or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Tribunal provided for in Section VI or by an Arbitrator appointed by that Tribunal. This compensation shall be borne by Germany, and may be charged upon the property of German nationals within the territory or under the control of the claimant's State. This property may be constituted as a pledge for enemy liabilities under the conditions fixed by paragraph 4 of the Annex hereto. The payment of this compensation may be made by the Allied or Associated State, and the amount will be debited to Germany.

* * * * *

(h) Except in cases where, by application of paragraph (f), restitutions in specie have been made, the net proceeds of sales of enemy property, rights or interests, wherever situated, carried out either by virtue of war legislation, or by application of this Article, and in general all cash assets of enemies, shall be dealt with as follows:

195 * * * * *

(2) As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Germany shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights and interests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any property, rights and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power and if retained the cash value thereof shall be dealt with as provided in Article 243.

* * * * *

196 (i) Germany undertakes to compensate its nationals in respect of the sale or retention of their property, rights, or interests in Allied or Associated States.

* * * * *

Annex.

* * * * *

2. No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or Department of the Government, of such a Power by Germany or by any German national wherever resident in respect of any act or omission with regard to his property, rights, or interests during the war or in preparation for the war. Similarly no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power.

* * * * *

197 3. In Article 297 and this Annex the expression "exceptional war measures" includes measures of all kinds, legislative, administrative, judicial, or

others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets for whatsoever motive, under whatsoever form, or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders, or decrees of Government Departments or Courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges, or expenses, or the collecting of fees.

Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing sale, liquidation, or devolution of ownership in enemy property, or the cancelling of titles or securities.

4. All property, rights, and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or

198 Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights, and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or, if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in

respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied.

* * * * *

9. Until completion of the liquidation provided for by Article 297, paragraph (*b*), the property, rights, and interests of German nationals will continue to be subject to exceptional war measures that have been or will be taken with regard to them.

199 10. Germany will, within six months from the coming into force of the present Treaty, deliver to each Allied or Associated Power all securities, certificates, deeds, or other documents of title held by its nationals and relating to property, rights, or interests situated in the territory of that Allied or Associated Power, including any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power.

* * * * *

15. The provisions of Article 297 and this Annex apply to industrial, literary and artistic property which has been or will be dealt with in the liquidation of property, rights, interests, companies or businesses under war legislation by the Allied or Associated Powers, or in accordance with the stipulations of Article 297, paragraph (*b*).

* * * * *

Article 302.

Judgments given by the Courts of an Allied or Associated Power in all cases which, under the present Treaty, they are competent to decide, shall be recognised in Germany as final, and shall be enforced without it being necessary to have them declared executory.

* * * * *

Section VI.—Mixed Arbitral Tribunal.

Article 304.

* * * * *

(g) The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive, and to render them binding upon their nationals.

200 *The Treaty of Peace (Amendment) Order, 1920.*

At the Court, at Buckingham Palace, the 28th Day of June,
1920.

Present, The King's Most Excellent Majesty in Council.

Whereas in pursuance of the powers conferred on Him by the Treaty of Peace Act, 1919, (a) His Majesty in Council was pleased to make the Treaty of Peace Order, 1919, (b) and it is expedient that the said Order should be amended in manner hereinafter appearing:

Now therefore His Majesty, by and with the advice of His Privy Council, is pleased to order, and it is hereby ordered as follows:

1. The provisions of the Treaty of Peace Order, 1919, set out in the first column of the Schedule to this Order shall be amended in the manner shown in the second column of that Schedule.

2. Paragraph (xvi) of Article one of the Treaty of Peace Order, 1919, shall have effect and shall be deemed always to have had effect as if for the proviso to that paragraph the following proviso were contained therein:

“Provided that any particular property rights or interests so charged may at any time be released by the Custodian acting under the general direction of the Board of Trade from the charge so created.”

201 3. This Order may be cited as the Treaty of Peace (Amendment) Order, 1920.

* * * * *

Schedule.

Article.	Nature of amendment.
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1	For the words “this Act” there shall be substituted “this Order.”
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* * * * *

- 1 (xvii) In sub-paragraph (a), after the words "the Custodian" the following words shall be inserted:
"acting under the general direction of the Board of Trade."

* * * * *

"In sub-paragraph (c), after the words "by the Custodian," the following words shall be inserted "notwithstanding any regulation or stipulation of the company or other body, and notwithstanding that the Custodian is not in possession of the certificate scrip or other document of title relating to the shares, stock or securities to which the application relates."

* * * * *

After sub-paragraph (c) the following paragraph shall be inserted:

"(cc) Where the property charged consists of property transferable on delivery, any person having the possession, control, or management of the property shall, on being so required by the Custodian, deliver the property to him, and the Custodian shall, subject to the consent of the Board of Trade, have power to sell or otherwise deal with the property so delivered to him."

* * * * *

The said Treaty of Versailles contains the following material definitions and signatures:

202 *Treaty of Peace with Germany.*

Signed at Versailles, June 28, 1919.

The United States of America, the British Empire, France, Italy and Japan.

These Powers being described in the present Treaty as the Principal Allied and Associated Powers.

Belgium, Bolivia, Brazil, China, Cuba, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicara-

gua, Panama, Peru, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam, Czecho-Slovakia and Uruguay.

These Powers constituting with the Principal Powers mentioned above the Allied and Associated Powers of the one part;

And Germany, of the other part;

Bearing in mind that on the request of the Imperial German Government an Armistice was granted on November 11, 1918, to Germany by the Principal Allied and Associated Powers in order that a Treaty of Peace might be concluded with her, and

The Allied and Associated Powers being equally desirous that the war in which they were successively involved directly or indirectly and which originated in the declaration of war by Austria-Hungary on July 28, 1914, against Serbia, the declaration of war by Germany against Russia on August 1, 1914, and against France on August 3, 1914, and in the invasion of Belgium, should be replaced by a
203 firm, just and durable Peace,

For this purpose the High contracting Parties represented as follows:

The President of the United States of America, by:

The Honourable Woodrow Wilson, President of the United States, acting in his own name and by his own proper authority;

The Honourable Robert Lansing, Secretary of State;

The Honourable Henry White, formerly Ambassador Extraordinary and Plenipotentiary of the United States at Rome and Paris;

The Honourable Edward M. House;

General Tasker H. Bliss, Military Representative of the United States on the Supreme War Council;

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British dominions beyond the seas, Emperor of India, by:

The Right Honourable David Lloyd George, M. P., First Lord of His Treasury and Prime Minister;

The Right Honourable Andrew Bonar Law, M. P. His Lord Privy Seal;

The Right Honourable Viscount Milner, G. C. B., G. C. M. G., His Secretary of State for the Colonies;

The Right Honourable Arthur James Balfour, O. M., M. P., His Secretary of State for Foreign Affairs;

The Right Honourable George Nicoll Barnes, M. P., Minister without portfolio;

And

for the Dominion of Canada, by:

The Honourable Charles Joseph Doherty, Minister of Justice;

The Honourable Arthur Lewis Sifton, Minister of Customs;

204 For the *Commonwealth of Australia*, by:

The Right Honourable William Morris Hughes, Attorney General and Prime Minister;

The Right Honourable Sir Joseph Cook, G. C. M. G., Minister for the Navy;

For the *Union of South Africa*, by:

General the Right Honourable Louis Botha, Minister of Native Affairs and Prime Minister;

Lieutenant-General the Right Honourable Jan Christian Smuts, K. C., Minister of Defense;

For the *Dominion of New Zealand*, by:

The Right Honourable William Ferguson Massey, Minister of Labour and Prime Minister;

For *India*, by:

The Right Honourable Edwin Samuel Montagu, M. P., His Secretary of State for India;

Major-General His Highness Maharaja Sir Ganga Singh Bahadur, Maharaja of Bikaner, G. C. S. I. E., G. C. V. O., K. C. B., A. D. C.;

In faith whereof the above-named Plenipotentiaries have signed the present Treaty.

Done at Versailles, the twenty-eighth day of June, one thousand nine hundred and nineteen, in a single copy which will remain deposited in the archives of the French Republic, and of which authenticated copies will be transmitted to each of the Signatory Powers.

[L. S.]	WOODROW WILSON.
[L. S.]	ROBERT LANSING.
[L. S.]	HENRY WHITE.
[L. S.]	E. M. HOUSE.
[L. S.]	TASKER H. BLISS.
[L. S.]	D. LLOYD GEORGE.
[L. S.]	A. BONAR LAW.

[L. S.]	MILNER.
[L. S.]	ARTHUR JAMES BALFOUR.
[L. S.]	GEORGE N. BARNES.
[L. S.]	CHAS. J. DOHERTY.
[L. S.]	ARTHUR L. SIFTON.
[L. S.]	W. M. HUGHES.
[L. S.]	JOSEPH COOK.
[L. S.]	LOUIS BOTHA.
[L. S.]	J. C. SMUTS.
[L. S.]	W. F. MASSEY.
[L. S.]	ED. S. MONTAGU.
[L. S.]	GANGA SINGH.
	MAHARAJA DE BIKANER, Etc.

205 Mr. Mundell further testified as follows:

“The Straits Settlements is a British Crown colony. Under the laws of Great Britain if property belonging to a corporation organized under the laws of the United States had been seized as enemy property and it was discovered that the corporation from which it was seized was not an enemy within British law, in my opinion the British authorities would return such property on application to them or in a suit brought in a proper court by such American corporation or its duly constituted representatives who would have authority to bring said action under the American laws, so also in a suit of a similar nature brought in the Straits Settlements if suit were necessary, and probably a suit would not be necessary. In the Straits Settlements there is an ordinance known as Crown Suits Ordinance to which I can refer. It is Ordinance No. 22 appearing at Page 277 of Volume 1 of the Revised Laws of 1926. In part 4 of that ordinance it deals with suits for redress against the Crown, and under that ordinance it has been held by the Privy Council that any person can sue the Crown in tort. I believe in England that cannot be done whereas it can in the Straits Settlements. I take it that wrongful seizure would be a tort on which the Crown could be sued if necessary.

“In my view, the British Government was entitled to the majority of the shareholders’ interests of this company.

206 “Under the Clearing Office Ordinance of 1921, which incorporates certain provisions of the Peace

Treaty, and is a part of the law of the Straits Settlements, on page 42 of Exhibit 19 it is provided:

“All property, rights and interests of German nationals within the territory of any Allied or Associated Power may be charged by that Allied or Associated Power with the payment of the amounts due * * * the claims of nationals by that Power.”

“And the interests of shareholders could therefore be charged under the Ordinance, and under section 16 of the Order in Council of His Majesty, which is also a part of the Ordinance, and the text of which appears at page 26 of Exhibit 19, which provides that all property, rights and interests within His Majesty's dominion or protectorates, belonging to German nationals at the date of the Treaty coming into force, may do certain things with respect to payment of claims of British nationals, and so on. I need not go into that fully. The shares of this company were only transferable on the books of the company at the head office of the company. They were not in any way transferable by delivery, and reference to the Articles of Association will show what I have said. Under these circumstances these shares were property within His Majesty's dominion, and were subject to the charge of the Crown by Order in Council and the law of the Straits Settlements.

“Furthermore, under section XVII it is provided:

“With a view to making effective and enforcing such charge,

“(a) No person shall without the consent of the Custodian transfer, part with or otherwise deal in any property, right or interest subject to the charge.”

That is the charge previously referred to. Under section X of the Annex to Article 298, which appears at
207 page 43 of the same exhibit, it is provided:

“Germany will within six months from the coming into force of the present Treaty, deliver to each Allied or Associated Power all securities, certificates, deeds or other documents of title held by its nationals and relating to property, rights or interests situated in the territory of the Allied or Associated Power, including any share of Stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power.”

"In my opinion the shareholders of Behn, Meyer & Company, Ltd., could not validly hold the meeting of December 13, 1921 which is alleged to have been held in Hamburg, Germany, for the purpose of authorizing the German Directors and an attorney-in-fact for those German Directors to bring suit in the United States to recover these sums held by the Alien Property Custodian. Assuming the meeting was otherwise valid, the business transacted at the meeting is objectionable.

"Under the provisions of subdivision "b" of Article 297 of the Treaty of Versailles, as incorporated into the Clearing Office Ordinance, it is provided:

"Subject to any contrary stipulations which may be provided for in the present treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals or companies controlled by them within their territories, Colonies, possessions and protectorates, including territories ceded to them by the present Treaty. The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned."

208 And these are the particular words I refer to:

"and the German owner shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that State."

"Now in my view the proceedings of that meeting effected to dispose of rights and interests which were subject to the charge, and therefore the German owner was prohibited from doing so by the Clearing Office Ordinance.

"The meeting of directors alleged to have been held at Hamburg, Germany on December 13, 1921 for the purpose of empowering Emil Martens to bring a suit in the United States for this property held by the Alien Property Custodian, is open to the same objection as a meeting of shareholders. In my opinion the meeting of the Consulting Committee is open to the same objection, although I know of no provision of Law which treats of such persons as being directors of the company. It seems to me, that although they were not named as directors in the articles, they were a species of director and that they would be subject to the same limitations as the directors would be subject to.

“The subsequent alleged ratifications by the shareholders of the proceedings taken by the shareholders, directors and Consulting Committee meetings held on December 13, 1921, could add nothing to the validity of the original meetings and proceedings. The ratifications by the directors of these same proceedings are open to the same objection as are the ratifications of the shareholders. So far as the meeting which was held on January 3, 1927 is concerned, I do not think that any meeting held in Hamburg, or elsewhere, would have been able to pass a resolution to the effect set out in the notice which would have been binding on the company.

209 If a meeting of this kind was held and if this resolution were passed, I do not think it had any effect under the law of the Straits Settlements for the reasons which I have already stated.”

At the conclusion of the direct examination of Mr. Mundell he left the stand in order that Sir Thomas Willes Chitty might be called as a witness in rebuttal for the plaintiffs in Equity No. 40361. As Sir Thomas was about to return to England it was agreed that his testimony might be put on out of the regular order.

Sir Thomas Willes Chitty testified as follows:

210 (Sir Thomas then gave testimony in opposition to that of Mr. Mundell on the question of the power of the liquidators by their appointment to collect assets outside of the Straits Settlements and was cross-examined by Mr. Coudert and Mr. Doing and by Mr. Stanley on this subject, none of which testimony is material on the issues raised in this appeal.)

“I was called to the bar in June, 1877. I practiced at the bar and did a very large practice until 1901. I was then appointed as one of the Masters of the Kings Bench Division in England. In 1921 I was appointed the Senior Master of the Kings Bench Division and the Kings Remembrancer. As Senior Master I had a great deal to do with the Colonial Office and the Foreign Office, and I went abroad on some occasions for our Foreign Office to settle conventions with foreign powers. I have also acted as managing editor of a book called ‘Hallsbury’s Laws of

212 "What I have just testified to on direct examination amounts to this, that if an official or the Governor of the Straits Settlements wrongfully seized property of an American corporation, that is, wrongful under the laws of the Straits Settlements they would make restitution. As a matter of fact, of course, either under the laws of the Straits Settlements or the laws of England if a wrong is done by the government of either of those countries in the way of seizure of property that wrong will be righted by the courts or some administrative or executive official. But there is a distinction between the Straits Settlements where the Crown can be sued in tort, I understand, and England where the Crown cannot be sued in tort. In England you have to sue the officer who took the property, something like it is in the United States. In the Straits Settlements they would have an action to recover the property if it is wrongfully seized. I suppose a corporation organized under the laws of New York having one-third of its stock issued or held by or on behalf of persons who were subjects of or carrying on business in a state for the time being at war with His Majesty would be an enemy company under the definition contained in Section 2 of the Alien Enemies (Winding-up) Ordinance of the Straits Settlements where "enemy company" is defined and "means a company one-third or more of the issued share capital or the directorate of which immediately before or at any time since the 4th day of August, 1914, was held by or on behalf of or consisted of persons who were subjects of or resident or carrying on business in a state for the time being at war with His Majesty." Under that definition if a New York cor-

213 poration had one-third of its stockholders subjects of a state at war with England or one-third of stockholders resident in Germany or one-third of its stockholders doing business in Germany and the corporation has a branch in the Straits Settlements and is carrying on business there, it sort of looks like it was an enemy under the Straits Settlements law but it is pretty difficult to understand just exactly what it does mean. I do not know what it does mean (referring to the statute). It is the most involved sentence and it is like many acts of Parliament. It is most difficult to make out what it does mean. There are several different

definitions of an enemy company. I should not like to say one way or the other whether or not a New York company one-third of whose stock or more is owned by subjects of Germany and which has a branch or a business in Singapore is subject to having the branch wound up by a liquidator in Singapore. Assuming that a New York company one-third of whose stock was owned by subjects of nations at war with Great Britain is an enemy company within the definition of the act if the Governor of the Straits Settlements appointed a liquidator to wind up the affairs of any trade of that company in the Straits Settlements the Governor would be entirely within his legal rights under that statute because the seizure would be rightful. Assuming that the Governor did appoint a liquidator for such a company and that this was a rightful appointment there is no way as of right that I am aware of under the laws of the Straits Settlements that the American corporation could have the liquidation raised and the assets returned to it.

214 If a liquidator under those circumstances paid over the assets to the custodian of enemy property of the Straits Settlements that custodian would hold those assets subject to the provisions of the Treaty of Versailles between England and Germany. Such a company which had its assets in the Straits Settlements rightfully seized would have no action against the custodian of enemy property or the liquidator and therefore I suppose the custodian of enemy property would hold those assets under the provisions of the Treaty of Versailles."

This concluded the cross-examination by Mr. Stanley and direct examination was resumed upon which Sir Thomas testified as follows:

"As I understand the English law, which for all I know is the same as the law in the Straits Settlements, a single shareholder can commence an action in the name of the company. According to our procedure if anyone objects the court will then order a meeting to be held, assuming there has not been one, so as to get the opinion of the majority of the shareholders. That is, if it is apparent that the action is approved of by a large majority of the shareholders—and in this particular case it is 29,000 out of

30,000 I think or more—then the court will not go through the form of ordering a meeting to be held with an obvious result. In our country you cannot plead a thing of this sort, you have got to make application at an early stage of the action to have the proceedings stayed on the ground that

they are not authorized. On that application the
215 court will direct a meeting to be held, unless looking

at the papers the amount of shares held by the parties who are in favor of the proceeding, makes it obvious that there is no use of holding a meeting. In this case it would be useless to hold a meeting where you have 29,000 on one side and you do not know what the feelings on the other are. The court would let the action go on. All these difficulties about the shareholders and these meetings are really matters of internal arrangement, and the only person who could object to them is a shareholder or a director. Let any shareholder who objects come before the court and state his objection. But it is not open to a third party to object. Supposing that an irregular meeting is held and subsequently a regular meeting is held, I cannot conceive of any reason why the subsequent meeting should not ratify what was done at the previous meeting. You may always ratify an act which was done in your name even although at the time it was not authorized. Assuming but not conceding that there was an irregularity in the calling of the stockholders' meeting of December 13, 1921, or an irregularity in calling the meeting of the board of directors held on the same day, or assume that these meetings should have been held in Singapore rather than in Germany, I imagine if it was shown that the consulting committee was entitled under those Articles of Association, as apparently they were, to have control of the whole company so that they
could get anything done that they wanted done, I

216 suppose if the court was shown that fact the court would let the action go on. The Articles of Association are a contract between the members of the association and the association but not with anybody else. It appears to be the effect of the Articles that in view of the powers of the consulting committee as set forth in Section 117 of the Articles of Association the consulting committee could approve whatever act was taken by the stockholders and directors no matter how irregular."

On cross-examination by Mr. Coudert Sir Thomas said:

“The situs of the shares of stock of the corporation was in the place where the corporation is registered, that is, in the domicile of the corporation. The shares and the holding of the shares would be governed by the domiciliary law and would be transferable by that law.”

On further cross-examination by Mr. Doing Sir Thomas said:

“An American company one-third of whose shareholders were when the Alien Enemies (Winding-Up) Ordinance went into effect subjects of a State at war with Great Britain, if it had a place of business in Singapore, would be an enemy company within the definition contained in Section 2 of the Alien Enemies (Winding-Up) Ordinance.

* * *

“A single stockholder of a company could in the first instance bring a suit on behalf of the company in the name of the company, and then if other stockholders came into court and objected to the bringing of the suit the court would direct that a meeting of the company be held for the purpose of determining whether or not the suit should continue, and if representations were made to the court by a large number of shareholders, such a large number that the court would be sure how the meeting would vote on the question, the court might dispense with a meeting and dispose of the case in accordance with the directions of this large number of shareholders which had represented itself to the court.

217 Q. So that as an example, if a shareholder brought a suit on behalf say, of Behn, Meyer & Company, Limited, and a majority of the shareholders objected to the bringing of that suit, and prayed the Court to abate the same, and the Court should see that it was a majority that was objecting to the suit, and that it would not be necessary to hold a meeting, the court would hear that objection and abate the suit; am I correct in that? A. I do not really know of an instance of that kind having happened, and whether the court would require the calling of a meeting or not I do not know. But it would not matter, because the only cases I have, and the only cases I know about are cases where the court has been satisfied that the majority was so

large that it would be a more formality to hold a meeting, and the court dispensed with a meeting.

“A single shareholder can bring an action in the name of the company or several shareholders can bring an action in the name of the company. If the majority of the company object to that the majority will make application to the court to stop the action. The shareholder does have the right to bring a suit in the name of the company against third parties and that suit is not defective by reason of the fact that it was instituted by a shareholder and not, for example, a director or the board of directors. The only question under our law is whether the action in the name of the company whatever it be is sanctioned by a majority of the shareholders. In other words, the technicalities of the Articles of Association are matters which the shareholders amongst themselves are to rely on. As a rule a third party cannot. Whether or not the legislation is confiscatory is to be determined by the law of the forum. I have never practiced law in the Straits Settlements actually.”

On redirect examination Sir Thomas testified:

“I am a barrister.”

After completing his testimony on Thursday, January 27, 1927, Sir Thomas left the city to begin his journey back to England. On Monday, January 31, 1927, the following occurred:

Mr. Gordon: If the Court please, at the hearing Thursday Mr. Kresel, quite properly and rightly, before he put Sir Thomas on the stand ascertained that Mr. Mundell was through with his direct examination. In our conferences over the week end it has developed that there are a few more questions that we would like to ask Mr. Mundell, and in doing that I want to make sure that there is no unfairness by reason of the fact that Sir Thomas is gone, so I would like to offer that if any of the testimony that Mr. Mundell might give now on direct on these particular matters that we ask him is in the opinion of Mr. Kresel such testimony as Sir Thomas would have answered had he been here, we would be very glad to have Sir Thomas make a written statement of what he would have said, and file it in the case without any cross examination on our part,

with the same effect as though he had been present to testify, and with that in mind we should like to have permission to ask Mr. Mundell a few more questions. Would there be any objection to that, Mr. Kresel?

Mr. Kresel: No.

219 **Mr. Mundell** resumed the witness stand and was shown three documents each entitled "Vesting Order by Governor in Council." He identified the signature of Mr. Morton, the Clerk of the Council in Singapore, to each document. Mr. Mundell further testified as follows:

I know Mr. Morton and know that he is the Clerk of the Council. There is a Straits Settlements Gazette which evidences his appointment. This is the Government Gazette (referring to paper handed him.) On page 6 appears the notification of appointment. It is under No. 6:

"His Excellency, the Governor has been pleased to appoint Mr. F. J. Morton, Malayan civil service, to be Clerk of Councils, with effect on and from the second of January, 1926."

As a matter of fact Mr. Morton acted as Clerk of Councils before that date. Ever since I have been in the Straits Settlements orders by the Governor in Council have been signed by the Clerk of the Council. As a lawyer of the Straits Settlements I say that he did so previously. The provisions of the Straits Settlements law under which the vesting orders in question were made were in Straits Settlements Clearing Office Ordinance No. 7 of 1921. Liquidators' Exhibit 19.) By this ordinance the provision of his Majesty's Order in Council of the 28th of June, 1920, with certain modifications, was made the law of the Colony, and one of the modifications was that where in the order the words "Board of Trade" appear or "President of the Board of Trade" the words "Governor in Council" should be substituted for them. Under Article 1 (XVII) (c) of the Order of Council it says:

220 "Where the property charged consists of inscribed or registered stock, shares or other securities, any company, municipal authority or other body by whom the securities were issued or are managed shall, on application

being made by the Custodian, enter the Custodian in the books in which the securities are inscribed or registered as the proprietor of the securities subject to the charge, and the Custodian shall, subject to the consent of the Board of Trade"—

There, of course, the words "Governor in Council" would be substituted—

"have power to sell or otherwise deal with the securities as proprietor of which he is so registered or inscribed;"

And then under section (d) :

"The Board of Trade"—

there, again, those words would be changed to "The Governor in Council"—

"may by order vest in the Custodian any property, rights and interests subject to the charge, or the right to transfer the same, and for that purpose section four of the Trading with the Enemy (Amendment) Act, 1916, shall apply as if such property, rights and interests were property belonging to an enemy or enemy subject."

(cc) occurs in the amendment. There is a schedule showing amendments to the original Order in Council and the schedule shows that after sub-paragraph (c) the following paragraph should be inserted:

221 "(cc) Where the property charged consists of property transferable on delivery, any person having the possession, control, or management of the property shall, on being so required by the Custodian, deliver the property to him, and the Custodian shall, subject to the consent of the Board of Trade"—

that would be "Governor in Council"—

"have power to sell or otherwise deal with the property so delivered to him."

That is the amendment.

"There was an English decision showing the right under the treaty to charge shares at the home of the corporation which the courts of the colony would undoubtedly follow. It

was the case of Baeltz v. Public Trustee. There was also the Randfontein case, a South African case, which I think went to the Privy Council. There was also another as to the custodian's rights to vote on that kind of thing. I think that was Pharaon et Fils, 1918, I think, or 1916. I have no doubt whatever of the right of the Governor in Council to vest these shares owned in a corporation organized under the laws of the Straits Settlements under the treaty and under the Straits Settlement legislation. The effect of the vesting is to give the custodian exactly the same rights as if he were a member of the company. The Straits Settlements Ordinance V of 1916, Section 5, enacts the law in the Straits Settlements similar to Section 4 of the Trading with the Enemy Act, 5 and 6 of George V, Chapter 105. But it is the English Act which is made applicable under the terms of the Clearing Office Ordinance of 1921. That is already in evidence. The citation of Pharaon et Fils is 1 Chanc. 1."

222 Mr. Gordon then offered in evidence the three vesting orders as to which Mr. Mundell had testified which were marked for identification as Liquidators' Exhibits 24, 25 and 26, respectively. They were as follows:

Vesting Order by the Governor in Council.

(Stamps in upper right-hand corner, as follows:)

Singapore: \$5.

Straits Settlements Postage Revenue: \$5.

Whereas under the Clearing Office Ordinance 1920 the Provisions of His Majesty's Order in Council of the 18th day of August 1919 have been applied to the Colony subject to the modifications set out therein:

And whereas under Article i (XVI) of the aforesaid Order in Council all property rights and interests within His Majesty's Dominions or Protectorates belonging to German Nationals at the date when the Treaty of Peace with Germany came into force, that is to say, the 10th day of January 1920 (not being property rights or interest acquired under any general license issued by or on behalf of His Majesty), and the net proceeds of their sale liquidation or other dealings therewith are charged with the payment of the claims set out therein:

And whereas under Article i (XVII) of the aforesaid Order in Council with a view to making effective and enforcing such charge as aforesaid the Governor in Council may by order vest in the Custodian of Enemy Property rights and interests subject to the charge, and for
223 that purpose Section 5 of the Trading with the Enemy (Amendment) Ordinance 1916 shall apply as if such property rights and interests were property belonging to an Enemy or Enemy subject:

Now therefore by virtue of the powers aforesaid the Governor in Council hereby orders that the following shares in Behn Meyer and Company, Limited, Singapore, registered in the name of Ad. Laspe, viz. 3,253 preference shares and 6,418 ordinary shares do vest in the Custodian of Enemy Property with the powers specified or referred to in Article 1 (XVII) (c) (cc) and (d) of the aforesaid Order in Council or any amendment thereof subject to the modifications set out in the Clearing Office Ordinance 1920 or any amendment thereof.

(Signed)

F. J. MORTON,
Clerk of Councils.

Council Chamber, Singapore, 13th November, 1926.

224 (Stamps in upper right-hand corner, as follows:
Singapore: \$5.

Straits Settlements Postage Revenue: \$5.

Vesting Order by the Governor in Council.

Whereas under the Clearing Office Ordinance 1920 the Provisions of His Majesty's Order in Council of the 18th day of August 1919 have been applied to the Colony subject to the modifications set out therein:

And whereas under Article 1 (XVI) of the aforesaid Order in Council all property rights and interests within His Majesty's Dominions or Protectorates belonging to German Nationals at the date when the Treaty of Peace with Germany came into force, that is to say, the 10th day of January 1920 (not being property rights or interests acquired under any general license issued by or on behalf of His Majesty), and the net proceeds of their sale liquida-

tion or other dealings herewith are charged with the payment of the claims set out therein:

And whereas under Article 1 (XVII) of the aforesaid Order in Council with a view to making effective and enforcing such charge as aforesaid the Governor in Council may by order vest in the Custodian of Enemy Property rights and interests subject to the charge, and for that purpose Section 5 of the Trading with the Enemy (Amendment) Ordinance 1916 shall apply as if such property rights and interests were property belonging to an Enemy or Enemy subject:

225 Now therefore by virtue of the powers aforesaid the Governor in Council hereby orders that the following shares in Behn Meyer and Company, Limited, Singapore, registered in the name of F. H. Witthoefft, viz. 3,253 preference shares and 6,418 ordinary shares do vest in the Custodian of Enemy Property with the powers specified or referred to in Article 1 (XVII) (c) (cc) and (d) of the aforesaid Order in Council or any amendment thereof subject to the modifications set out in the Clearing Office Ordinance 1920 or any amendment thereof.

(Signed)

F. J. MORTON,
Clerk of Councils.

Council Chamber, Singapore, 13th November, 1926.

226 (Stamps in upper right-hand corner, as follows:)
Singapore: \$5.

Straits Settlements Postage Revenue: \$5.

Vesting Order by the Governor in Council.

Whereas under the Clearing Office Ordinance 1920 the Provisions of His Majesty's Order in Council of the 18th day of August 1919 have been applied to the Colony subject to the modifications set out therein:

And whereas under Article 1 (XVI) of the aforesaid Order in Council all property rights and interests within His Majesty's Dominions or Protectorates belonging to German Nationals at the date when the Treaty of Peace with Germany came into force, that is to say, the 10th day of January 1920 (not being property rights or interests acquired under any general license issued by or on behalf

of His Majesty), and the net proceeds of their sale liquidation or other dealings therewith are charged with the payment of the claims set out therein:

And whereas under Article 1 (XVII) of the aforesaid Order in Council with a view to making effective and enforcing such charge as aforesaid the Governor in Council may by order vest in the Custodian of Enemy Property rights and interests subject to the charge, and for that purpose Section 5 of the Trading with the Enemy (Amendment) Ordinance 1916 shall apply as if such property rights and interests were property belonging to an Enemy or Enemy subject.

227 Now therefore by virtue of the powers aforesaid the Governor in Council hereby orders that the following shares in Behn, Meyer and Company, Limited, Singapore, registered in the name of Ed. L. Lorenz Meyer, viz. 3253 preference shares and 6418 ordinary shares do vest in the Custodian of Enemy Property with the powers specified or referred to in Article 1 (XVII) (c) (cc) and (d) of the aforesaid Order in Council or any amendment thereof subject to the modifications set out in the Clearing Office Ordinance 1920 or any amendment thereof.

(Signed)

F. J. MORTON,

Clerk of Councils.

Council Chamber, Singapore, 13th November, 1926.

228 Mr. Stanley objected to the introduction of these exhibits as immaterial and irrelevant. He stated that the liquidators were contending that their holding was aside from their relationship to the stock ownership of the company, that under the Supreme Court decision the stock ownership was immaterial, that the orders appeared to have been entered after the seizure by the Alien Property Custodian, that the ownership of stock in the corporation is not in controversy, that as between the United States Government and the British Government the United States Government has the right to seize anything within its territorial bounds, and that the custodian of enemy property is not a party to the proceedings.

Mr. Kresel joined in Mr. Stanley's objections and in addition objected on the ground that there was no authority

under the Treaty of Versailles to seize German property after the treaty went into effect, that the vesting orders had absolutely no validity.

Mr. Gordon called attention to the fact that Mr. Kresel had introduced in evidence a resolution of November 3, 1926, signed by Adolf Laspe and F. H. Witthoefft as stockholders controlling more than three-fifths of Behn, Meyer & Company for the purpose of confirming and ratifying what had been done in Mr. Kresel's suit and that Sir Thomas had testified that a suit might be adopted as the action of the company by a majority of the stockholders. Mr. Gordon then stated that it was his theory that the liquidators had the right to bring the suit and to bring it in the name of the company and that their authority would cover property wherever situate, that Mr. Kresel contended that the liquidators' rights were confined to business in the Straits Settlements itself geographically speaking and that after the appointment of the liquidator

229 there was a residue of power in the stockholders and that the stockholders have the right to control the affairs of the corporation, that the plaintiff in Equity 45881 therefore proposed to show that Mr. Kresel's clients were not stockholders at this time, that the custodian of enemy property in the Straits Settlements is the owner of more than three-fifths of the stock of Behn, Meyer & Company, Ltd., and that he by his duly constituted attorneys passed a resolution exactly like Mr. Kresel's resolution of November 3, 1926, (Behn, Meyer & Company Exhibit 28) in form but different in substance in that it confirms the action brought by the liquidator of Behn, Meyer & Company on behalf of the company and disaffirms the action brought by Mr. Martens on behalf of the company so that if the vesting orders have the effect of making the custodian a stockholder counsel for the plaintiff in Equity 45881 represent both the liquidator and the stockholders.

Mr. Kresel continued his objections by urging that the vesting orders of November 13, 1926, could not detract from the force of the resolution signed by three-fifths of the stockholders November 3, 1926. Mr. Kresel urged further that the Treaty of Versailles only permitted the allied powers to retain property already seized and did not permit them to vest property after the treaty. Mr. Kresel

objected further that the custodian was not a party to the proceedings and that the liquidators' suit was based on the Winding Up Ordinance only.

After the objections had been made and the statement had been made by Mr. Gordon the Court admitted the three vesting orders in evidence as Liquidators Exhibits 24, 25 and 36, stating that the questions raised were such that they could be decided on the final argument of the case.

230 Mr. Mundell then identified the signatures and seals on a certain power of attorney. Mr. Kresel objected thereto and the Court reserved its ruling thereon. Mr. Mendell stated that the power of attorney in question was still in effect. This power of attorney was then offered in evidence as Liquidators' Exhibit 27 and was as follows:

STRAITS SETTLEMENTS,

City of Singapore,

American Consulate General, ss:

I, Edwin McKee, Vice Consul of the United States of America at Singapore, in the Colony of the Straits Settlements, duly commissioned and qualified, do hereby certify that Clement Everitt, whose name is attached to the annexed document, is a duly authorized Notary Public in and for the Colony of the Straits Settlements.

Given under my hand and the seal of this Consulate General this 18th day of November, 1926.

(Signed)

EDWIN McKEE,

[SEAL.]

Vice-Counsel of the United States

of America at Singapore, S. S.

American Consulate General, Singapore, Straits Settlements.

Fee No. 1853.

American Fee Stamp: \$2.

(Stamped, with rubber stamp, on above:) American Consulate General, 18 Nov., 1926, Singapore.

231 To all to whom these presents shall come I Clement Everitt of the Settlement of Singapore in the Crown Colony of the Straits Settlements Notary Public duly au-

thorized admitted and sworn residing and practising in the said Settlement do hereby certify and attest—

That I was present on the 18th day of November one thousand nine hundred and twenty six at my office at Union Building Singapore aforesaid and did there see the Common Seal of the Company called Behn, Meyer & Company Limited affixed at the foot of the instrument in writing hereunto annexed and marked "A" and that the Seal thereto affixed is the genuine Common Seal of the said Company.

That at the same time I did also see Charles Vernon Bailey and James Arthur Clarke both of French Bank Building Singapore Chartered Accountants partners in the firm of Evatt & Co. who are personally know to me to be the Liquidators appointed under the provisions of the Alien Enemies (Winding up) Ordinance 1914 of the Straits Settlements to wind up the affairs of the trade carried on in the Colony by the said Company severally signed the said instrument in writing opposite the said Seal and opposite their seals appearing at the end of the said instrument.

That at the same time I did also see Ralph Glyn Evans personally known to me to be the person holding office as Custodian of Enemy Property under the provisions of the Trading with the Enemy (Amendment) Ordinance 1915 of the Straits Settlements sign the said instrument in writing opposite his seal appearing at the end of the said instrument.

That at the same time the said Charles Vernon Bailey, James Arthur Clarke and Ralph Glyn Evans did acknowledge and as their act and deed severally deliver the said instrument in writing.

That the names and signatures C. V. Bailey, J. A. Clarke and R. G. Evans severally set and subscribed at the foot of the said instrument in writing opposite the said seals are of the respective proper handwritings of the said Charles Vernon Bailey, James Arthur Clarke and Ralph Glyn Evans.

And lastly that the said instrument in writing was duly executed by the said Company and the said Charles Vernon Bailey, James Arthur Clarke and Ralph Glyn Evans

in accordance with the Laws of the Straits Settlements wherefore full faith should be given thereto in judicature and without.

Whereas an Act being required I the said Notary have granted these presents under my Notarial Firm and Seal to serve and avail when and where need may require.

Done and passed in Singapore aforesaid the eighteenth day of November in the year of Our Lord One thousand nine hundred and twenty six.

(Signed) CLEMENT EVERITT,
[SEAL.] *Notary Public, Singapore.*

(Stamp:) Straits Settlements Postage Revenue, 50¢.
18/11/26.

233

“A.”

(Notary's seal, as follows:) Clement Everitt, Notary Public, Singapore.

(Written in red, on side of first page, is the following:)

This is the instrument of Power of Attorney marked “A” referred to in my Notarial Certificate dated the 18th day of November, 1926 and hereto annexed.

(Signed) CLEMENT EVERITT,
Notary Public.

To all to whom these present shall come Behn, Meyer and Company, Limited, a Company incorporated under the provisions of the Companies Ordinance 1889 of the British Crown Colony of the Straits Settlements having its Registered Office in Singapore in the Straits Settlements aforesaid (hereinafter referred to as “the Company”) and Charles Vernon Bailey and James Arthur Clarke both of French Bank Building Singapore aforesaid Chartered Accountants and the Custodian of Enemy Property appointed under the provisions of the Trading with the Enemy (Amendment) Ordinance 1915 of the Straits Settlements in and for the said Colony of the Straits Settlements (hereinafter referred to as “the Custodian”) send greeting:

Whereas the Company was incorporated on the 11th day of December 1905 with the objects and for the pur-

poses more particularly specified in its Memorandum of Association which included inter alia the acquisition and carrying on of the business of general merchants theretofore carried on by a partnership firm known as Behn, Meyer & Company at Singapore aforesaid and at
234 Penang in the Straits Settlements and at various other places to wit at Bangkok in Siam at Sandakan in British North Borneo at Batavia and Sourabaya in Java and at Manila Ilo-Ilo Zamboanga and Cebu in the Philippine Islands:

And whereas until shortly after the commencement of the Great War in the year 1914 the Company carried on business in accordance with its Memorandum and Articles of Association and such business as controlled and managed by the Directors of the Company duly appointed in accordance with its Articles of Association.

And whereas after the passing of the Alien Enemies (Winding Up) Ordinance 1914 of the Straits Settlements (which with its amending Ordinances is hereinafter referred to as "the Ordinance") to wit on the 2nd day of January 1915 His Excellency the Governor of the Colony of the Straits Settlements (hereinafter referred to as "the Governor") under the provisions of Section 3 of the Ordinance issued a certificate under his hand that the Company was in his opinion an Enemy Company within the meaning of the Ordinance and on the said 2nd day of January 1915 in pursuance and exercise of the powers and authorities in that behalf enabling him the Governor appointed William Harvey MacGregor of Singapore (hereinafter referred to as "the Original Liquidator") to be Liquidator to wind up the affairs of the trade carried on in the Colony by the Company.

And whereas by Section 8 of the Ordinance it was enacted that the rights and powers of the Original liquidator should take effect as from the 18th day of December
235 1914 and thereafter during the period of the war the Original Liquidator in accordance with the provisions of the Ordinance proceeded to wind up the trade of the Company carried on in the Colony and to pay off various claims against the Company.

And whereas the Original Liquidator desired to relinquish his appointment as such Liquidator as aforesaid and on the 16th day of February 1924 under the provisions of Subsection (4) of Section 4 of the Ordinance the Governor in exercise of the powers and authorities in that behalf enabling him revoked the appointment of the Original Liquidator and appointed Messieurs Evatt & Co. of Singapore to be Liquidators of the Company.

And whereas on the 12th day of November 1924 the Governor in like manner revoked the appointment of Messieurs Evatt & Co. as such Liquidators as aforesaid and appointed Charles Vernon Bailey and Sydney Whitaker both of Singapore Chartered Accountants (partners in the said firm of Evatt & Co.) to be Liquidators of the Company as from the said 12th day of November 1924.

And whereas on the 20th day of April 1926 the Governor in like manner revoked the appointment of the said Charles Bailey and Sydney Whitaker as such Liquidators as aforesaid and appointed the said Charles Vernon Bailey and James Arthur Clarke both of French Bank Building, Singapore, Chartered Accountants partners in the said firm of Evatt & Co. to be Liquidators as from the said 20th day of April 1925 to wind up the affairs of the trade carried on in the Colony by the Company and empowered either of them to act alone in such winding up for any of the powers or purposes exercisable by a Liquidator under the Ordinance.

236 And whereas it is believed that the businesses of the Company in the Philippine Islands were after the outbreak of the said War until the United States of America joined in the said War carried on by the Agents of the Company who prior to the War or after its commencement had been appointed by the persons who were Directors of the Company prior to the War or after its commencement purported to act as such Directors.

And whereas after the United States of America joined in the War it is believed that the American Alien Property Custodian purporting to act under the American Trading with the Enemy Act seized the assets of the Company in the Philippine Islands realized such assets and paid the balance of such realization (hereinafter referred *as to* "the moneys in dispute") into the American Treasury.

And whereas in 1922 certain persons purporting to act as Directors of the Company (hereinafter referred to as "the German Directors") by Emil W. Martens one of their number instituted in the name of the Company a suit in the Supreme Court of the District of Columbia U. S. A. (hereinafter referred to as "the German Suit") claiming to recover the moneys in dispute and such suit was defended by Representatives of the American Government and is still pending.

And whereas after having become acquainted with the facts referred to in the two last preceding recitals the Liquidators commenced proceedings in the Supreme Court of the District of Columbia U. S. A. with the object of claiming and recovering the moneys in dispute and such proceedings are still pending.

237 And whereas in the month of September 1914 the capital of the Company consisted of \$3,000,000 divided into 10,000 Preference Shares of \$100 each and 20,000 Ordinary Shares of \$100 each and such Preference and Ordinary Shares were held by the persons and in the proportions following that is to say:

			Prefer- ence	Ordinary
Ed. L. Lorenz-Meyer, of Hamburg, Merchant.			3,253	6,418
Ad. Laspe,	"	"	3,253	6,418
F. H. Witthoefft,	"	"	3,253	6,418
J. M. Menzi,	"	Manila,	240	241
Engen Engler,	"	Hamburg,	1	500
Erwin Lehrenkrauss,	"	Singapore,		1
A. Diehn,	"	"		1
R. Schubert,	"	Penang,		1
A. Schoenburg,	"	Singapore,		1
G. Rademacher,	"	Sourabaya,		1
			10,000	20,000

And whereas on the 19th day of September 1914 the Company purporting to act through the said A. Diehn (who had been one of the Directors of the Company and was then the Manager of the Singapore business of the Company) caused to be filed with the Registrar of Companies in Singapore in accordance with the provisions of Section

52 of the said Companies Ordinance 1889 a return showing a summary of the Capital of the Company and a list of the persons who on the said 19th day of September 1914 held shares in the Company and such return showed that the capital of the Company consisted of the shares and was held in the proportions lastly hereinbefore recited.

238 And whereas under the provisions of Section 7 of the Trading with the Enemy (Amendment) Ordinance 1915 of the Straits Settlements the Governor was empowered to appoint a person to act as Custodian of Enemy Property for the purposes of receiving holding preserving and dealing with such property as might be paid to or vested in the Custodian in pursuance of such Ordinance.

And whereas in accordance with the provisions of the said Section 7 of the Trading with the Enemy (Amendment) Ordinance 1915 Robert Glyn Evans was appointed to be Custodian of Enemy Property and a notification to such effect was duly published in the Straits Settlements Government Gazette on the 13th day of November 1925 and the said Robert Glyn Evans is at the present time the Custodian of Enemy Property in and for the Colony of the Straits Settlements in accordance with the provisions of the said Ordinance.

And whereas by virtue of the Clearing Office Ordinance 1920 of the Straits Settlements the provisions of the order in Council made by His Majesty King George V on the 18th day of August 1919 have been applied to the Colony of the Strait- Settlements subject to the modifications set out therein.

And whereas under Article 1 (XVI) of the aforesaid Order in Council all property rights and interest within His Majesty's Dominions or Protectorates belonging to German Nationals at the date when the Treaty of Peace with Germany came into force, that is to say, the 10th day of January 1920 (not being property rights or interest acquired under any general license issued by or on behalf of His Majesty), and the net proceeds of their sale liquidation or other dealings therewith are charged with the payment of the claim set out therein.

239 And whereas under Article 1 (XVII) of the aforesaid Order in Council with a view to making effective

and enforcing such charge as aforesaid the Governor in Council was empowered by order to vest in the Custodian of Enemy Property rights and interests subject to the charge, and for that purpose Section 5 of the Trading with the Enemy (Amendment) Ordinance 1916 of the Straits Settlements was to apply as if such property rights and interests were property belonging to an Enemy subject.

And whereas the said Ed. L. Lorenz Meyer, Ad. Laspe and F. H. Witthoefft were and/or are enemy subjects within the meaning of the said Order in Council.

And whereas by virtue of the powers conferred upon him as hereinbefore recited the Governor in Council by the three several Vesting Orders all dated the 13th day of November 1926 ordered that the said Preference and Ordinary Shares of and in the Capital of the Company held by the said Ed. L. Lorenz Meyer, Ad. Laspe, and F. H. Whitthoefft should vest in the Custodian of Enemy Property with the powers specified or referred to in Article 1 (XVII) (c) (cc) and (d) of the aforesaid Order in Council or any amendment thereof subject to the modifications set out in the Clearing Office Ordinance 1920 of the Straits Settlements or any amendment thereof.

And whereas by virtue of the three several Vesting Orders hereinbefore recited and Custodian is entitled to 9,759 out of the said 10,000 Preference Shares and to 19,254 out of the said 20,000 Preference shares issued by the Company.

240 And whereas of the Articles of Association of the Company Article 81 (referring to the voting power of Members of the Company at meetings of the Company and at polls at such Meetings) provides that "Every Member shall have one vote for every share held by him" and Article 89 provides as follows: A resolution in writing signed by members entitled at a poll to three-fifths of the votes shall be as valid and effectual as a resolution of a general meeting but this clause shall not apply to a resolution for winding up the Company, or to a resolution passed in respect of any matter which by Ordinance or the regulations of the Company for the time being ought to be dealt with by a special or an extraordinary resolution.

And whereas by reason of the premises the Custodian is entitled to exercise the powers conferred by Article 89 of the Articles of Association of the Company.

And whereas the Custodian in exercise of the powers conferred by Article 89 of the Articles of Association of the Company has resolved as follows, that is to say:

1. That it is¹⁷ expedient that the German Directors or other the persons who purport to represent the Company in the German Suit should alone continue to so represent the Company in the German Suit should alone continue to so represent the Company and receive the moneys in dispute.

2. That it is expedient that the moneys in dispute should be paid to the Liquidators so that the same may be dealt with by the Liquidators under the provisions of the Ordinance.

3. That it is expedient to call and hold General Meetings of the Company and thereat to pass special resolutions of the Company with the object of altering the Articles of Association of the Company in the manner following, that is to say:

241 (a) To provide that the shares in the capital of the Company may be transferred to any person approved of by the Liquidators and at any price.

(b) To provide that General Meetings of the Company shall be held in Singapore and in no other place.

(c) To provide that General Meetings of the Company shall be held when required by the Laws of the Straits Settlements and when called by the Custodian or by the Liquidators.

(d) To provide that the German Directors or other the persons purporting to act as Directors of the Company in connection with the German Suit should vacate office as Directors of the Company unless they should agree to and act in accordance with the provisions of these presents.

(e) To provide that all Directors of the Company shall be appointed by the Custodian and shall vacate office when the Custodian so directs.

(f) To provide that a Director shall not require to be qualified as a Director by holding any share in the capital of the Company.

(g) To provide that Articles 107 to 117 both inclusive of the Articles of Association of the Company be annulled, cancelled and deleted.

(h) To provide that the Articles of Association be altered to give effect to the above provisions and be re-numbered accordingly.

242 but inasmuch as no shareholder of the Company other than the Custodian resides in the Straits Settlements it is impracticable at the present time to obtain a quorum at a General Meeting of the Company in Singapore.

4. That it is expedient to appoint persons to be Directors of the Company to act in conjunction with or in substitution for the German Directors or other the persons purporting to act as Directors of the Company and in particular in conjunction with or in substitution for the German Directors or other the persons purporting to represent the Company in the German Suit.

5. That having regard to the facts aforesaid it is expedient that Howell Dawson Mundell of Singapore, Advocate Solicitor and Notary Public and James Arthur Clarke should be appointed Directors of the Company and they are hereby appointed Directors of the Company.

6. That having regard to the facts aforesaid it is expedient that the said Howell Dawson Mundell and James Arthur Clarke and either of them as the Attorneys and Attorney of the Custodian under these presents should be empowered and authorized to appoint any other person or persons to be Directors of the Company and that they and each of them be and are hereby so authorized and empowered but so that the Directors of the Company when any appointment or appointments shall have been made under these presents or in pursuance thereof shall not exceed seven in number and that in computing such number regard shall if necessary or expedient be had to the German Directors or other the persons purporting to act as Directors of the Company in the German Suit.

243 7. That if by reason of the effect of the Articles of Association of the Company or by reason of the effect of the provisions of any Ordinance of the Straits Settlements the appointments of the said Howell Dawson Mundell and James Arthur Clarke or either of them as Directors of the Company and/or the appointment of any person or persons appointed by them or either of them (under the powers to be conferred upon them by these

presents) to be Directors of the Company shall become defective because they or any one of them may be unable to acquire the share qualification required by the Articles of Association of the Company and if by reason of such or any other fact or event or by operation of law they or any one or more of them are obliged to vacate office as such Directors they and each of them shall from the time or respective times of their appointments or appointment becoming defective as aforesaid or of vacating office as aforesaid be immediately reappointed Directors of the Company and that this provision shall have effect when and so often as they or any of them shall by reason of the events aforesaid or any of them cease to be Directors of the Company.

8. That the said Howell Dawson Mundell and James Arthur Clarke be and they are and each of them is hereby authorized to apply to the German Directors or other the persons purporting to act as Directors of the Company in connection with the German Suit or otherwise howsoever to pay or assure payment to the said Howell Dawson Mundell and/or the said James Arthur Clarke of all moneys if any receivable as a result of such Suit.

9. That in the event of the German Directors or other the persons purporting to act as Directors of the Company refusing to comply with the request of the said
244 Howell Dawson Mundell and/or the said James Arthur Clarke referred to in the preceding paragraph hereof the said Howell Dawson Mundell and James Arthur Clarke be at liberty to apply in the German Suit to be added as parties thereto with the German Directors or other the persons purporting to represent the Company therein so as to give effect to the preceding provisions of this resolution.

10. That the said Howell Dawson Mundell and James Arthur Clarke and each of them be appointed the Attorneys and attorney of the Company and of the Custodian so as to give effect to the preceding provisions of this resolution and that a power of attorney (being these presents) be granted to them for the purposes aforesaid and be sealed with the Common Seal of the Company.

And whereas the Custodian has joined in these presents and has signed the same so that the same may be and be evidence of a resolution in writing valid and effectual as a

resolution of a General Meeting of the Company in accordance with the provisions of Article 89 of the Articles of Association of the Company as well as evidence of the appointment of the Attorneys and Attorney of the Custodian for the purposes of these presents.

And whereas the Liquidators have joined in these presents for the purpose of testifying the consent thereto of the Company and of themselves as such Liquidators as aforesaid.

Now know yet therefore that the Company and the Liquidators and the Custodian and every and each of them hereby appoint the said Howell Dawson Mundell and the said James Arthur Clarke jointly and each of them severally to be the attorneys and attorney of the Company
245 and of the Custodian to the end and intent that the said Howell Dawson Mundell and the said James Arthur Clarke jointly and each of them severally may have and exercise all and singular the powers rights and authorities exercisable by the Company and by the Directors of the Company and by the Custodian as a shareholder of the Company and in such and any or either of such capacities to do all acts deeds and things necessary to give effect to the premises and without prejudice to the generality of the powers hereby conferred to have and exercise all such powers rights and authorities as if the resolution the terms of which are set forth in paragraphs 1 to 10 of the Recital hereinbefore contained and of which these presents are evidence had been passed as a special resolution of the Company and the Custodian in his capacity as a shareholder of the Company hereby authorizes and empowers the said Howell Dawson Mundell and James Arthur Clarke jointly and each of them severally to have and exercise all such rights and authorities as the Custodian as a shareholder of the Company has or may have for the purpose of calling meetings of the Company and of submitting resolutions to such meetings and of attending at such meetings and of voting in respect of such resolutions or any other resolutions put before such meetings and of signing resolutions under and otherwise exercising the powers conferred by Article 89 of the Articles of Association of the Company and all other such rights powers and authorities as are exercisable by the Custodian as a shareholder of the Com-

pany and the Company and the Custodian hereby empower the said Howell Dawson Mundell and James Arthur Clarke and each of them to substitute and appoint one or more attorneys to act for and on behalf of the Company
246 and for and on behalf of the Custodian and to have and exercise all or any of the powers exercisable by the said Howell Dawson Mundell and/or the said James Arthur Clarke under and by virtue of these presents.

And the Company and the Custodian hereby covenant and agree to ratify and confirm all and whatsoever the said Howell Dawson Mundell and James Arthur Clarke or either of them and any substitute or substitutes appointed by them or either of them under the foregoing provisions hereof shall lawfully do and cause to be done by virtue of these presents.

In witness whereof the Company has caused its Common Seal to be hereunto affixed and the Liquidators and the Custodian have hereunto set their hands and seals at Singapore this eighteenth day of November One thousand nine hundred and twenty six (1926).

The common Seal of Behn Meyer and Company Limited was hereto affixed in the presence of

(Signed) C. V. BAILEY.

J. A. CLARK.

The above mentioned Liquidators,

C. V. BAILEY. [SEAL.]

J. A. CLARKE.

R. G. EVANS.

Signed, sealed, and delivered by the said Charles Vernon Bailey, James Arthur Clarke, and Robert Glyn Evans in the presence of—

(Signed) CLEMENT EVERITT,

Notary Public, Singapore.

(On the back appears the following:) Dated 18th November, 1926. Behn Meyer & Company, Limited, Messrs. C. V. Bailey, J. A. Clarke, and the Custodian of Enemy Property — to — Messrs. H. D. Mundell and J. A. Clarke. Power of Attorney. Sisson & Delay, Singapore.

247 Mr. Mundell also identified the signatures of Howell Dawson Mundell and James Arthur Clarke

to a certain resolution and the same was offered in evidence as Liquidators' Exhibit 28. It is as follows:

I, the undersigned, Robert Glyn Evans, of Singapore in the British Crown Colony of the Straits Settlements, the Custodian of Enemy Property of the Straits Settlements, and a member of Behn, Meyer & Co., Ltd., a corporation organized under the laws of the Straits Settlements (hereinafter called "the Corporation") entitled at a poll to three-fifths of the votes of the Corporation, in exercise of the powers conferred upon me by Article 89 of the Articles of Association of the Corporation, and acting by my attorneys, Howell Dawson Mundell and James Arthur Clarke, do hereby resolve as follows:

1. That it is expedient for the Corporation to adopt, ratify and confirm a certain suit brought in the name and on behalf of the Corporation by Charles Vernon Bailey and James Arthur Clarke, Equity No. 45881, in the Supreme Court of the District of Columbia, and that the said suit and the inception and institution thereof and each and every act, matter and thing had or done therein by or on behalf of the Corporation from the time of its inception or institution until the present time be, and they are hereby, adopted, ratified and confirmed.

2. That it is expedient for the Corporation to disaffirm and secure the dismissal of a certain suit brought in the name of the Corporation by one Emil Martens, Equity No. 40361, in the Supreme Court of the District of Columbia, and that said suit, Equity No. 40361, be, and the same is hereby, disaffirmed and all persons prosecuting said
248 suit, Equity No. 40361, be, and they are hereby
called upon to discontinue the same, provided that
nothing contained herein shall be construed as a recognition that said Equity No. 40361 is or was at any time authorized by or on behalf of the Corporation.

In witness whereof, I, the undersigned, Robert Glyn Evans, have made the foregoing resolution in writing and have by my attorneys, Howell Dawson Mundell and James Arthur Clarke, set my hand this 31st day of January, 1927.

(Signed)

ROBERT GLYN EVANS,

By His Attorneys, HOWELL D. MUNDELL,

JAMES ARTHUR CLARKE.

249 Mr. Kresel objected to the introduction of the power of attorney for the same reasons that he objected to the vesting orders and on the additional ground that there is no warrant in law for the custodian of the Straits Settlements to delegate power. Mr. Stanley made the same objections to the power of attorney that he had made to the vesting orders. Mr. Gordon stated that the power of attorney was offered in evidence for two purposes: (1) As the resolution itself under Article 89; (2) As a power of attorney authorizing Mr. Mundell and Mr. Clarke as attorneys to pass on behalf of Robert Glyn Evans the resolution (Liquidators' Exhibit 28).

Mr. Kresel objected to the document as a resolution itself in that it was unauthorized by the Articles of Association, that it is not in the form of a resolution, that it is not signed by stockholders owning three-fifths of the stock or by anyone who is a stockholder of Behn, Meyer & Company. Mr. Stanley objected to the document for the same reasons as those stated by Mr. Kresel and also on the same ground as his objections to the vesting orders.

Mr. Kresel objected to the introduction of the resolution (Liquidators' Exhibit 28) on the ground that it was unauthorized and invalid, that it purports to be a resolution signed by people who are not stockholders and who did not claim to be stockholders but who claim to have a power of attorney from somebody who claims to be a stockholder, that on its face it indicates its invalidity in that it is executed in the course of the trial to assist the expert who is himself the party, by power of attorney, to sustain a theory of law, that the matter is immaterial, irrelevant and incompetent.

250 Mr. Stanley objected to the resolution in that it was immaterial and irrelevant in that it was an attempt by an alleged stockholder of the company to do something with respect to the pendency of these suits, that the Supreme Court has held as far as the case has gone—"and at this point I do not wish to be understood as waiving any rights I hope to bring out in the future"—the ownership of the stock of this corporation is absolutely immaterial and irrelevant, that the case cannot be affected by anything done in the midst of the case.

At the conclusion of these objections the Court admitted the power of attorney and the resolution in evidence as Liquidators' Exhibit 27 and 28, respectively, subject to final argument on the case.

251 Upon cross-examination by Mr. Stanley Mr. Mundell testified as follows:

“I am counsel for the liquidators of Behn, Meyer & Company, Ltd. We act for Behn, Meyer & Company, Ltd. My firm advised the liquidators relative to the present suit when it was contemplated. I personally had nothing to do with it until October of last year. The present suit had then been started and it was a question of proceeding with the suit because the trial was fixed in January and Mr. Dickinson, one of my partners, who had been attending to it previously, was home on leave. Someone had to go into it, and I came into it because he was away. My firm acts as solicitors for the liquidators with respect to this suit.

“In my opinion under the definition contained in subsection 2 of the Alien Enemies (Winding-up) Ordinance defining an enemy company it is my opinion that a New York corporation having one-third its capital stock owned by subjects of Germany is an enemy company for the purposes of this ordinance if it carried on business in the colony, and had a branch in the colony. The Governor of the Straits Settlements therefore could appoint a liquidator under section 4 for the affairs of that American corporation in the colony. After the liquidation had been wound up I do not think the liquidator could turn the assets over to the custodian of enemy property without reference to the interests of non-enemy shareholders. Section 4, subsection 9, says that the winding-up is to be carried out for the benefit of the persons entitled to the profits of said trade or to any property dealt with by the liquidator. Under section 4, subsections 12 (y) and
252 (z) it is provided that any liability not necessarily incurred in connection with the trade can be paid by the liquidator with the consent of the Governor. At any rate I know that in case of firms which had non-enemy partners those non-enemy partners were paid out their

interest so I think the same principle would be followed in the case of a corporation. The liquidator would probably go to the court and say: 'Here are non-enemy shareholders. I should like to get the approval of the court to pay them.' The court would give approval and then he would go to the Governor and say: 'Please sanction the payment.' The Governor would say: 'Yes, these can be paid.' If this company, one-third of whose stock is owned by subjects of Germany had a branch in the Straits Settlements and liquidators had been appointed for it and had completed the liquidation, I should think the liquidators would take out two-thirds and not turn it over to the custodian of enemy property. I think he would pay it to the non-enemy stockholders because he is bound by the law to pay the interests of enemy stockholders to the custodian of enemy property unless the Governor says: 'Pay it to the enemy himself.' The other one-third in the usual course of events would be paid to the custodian of enemy property."

Q. Therefore to that extent in any event the British law would disregard that entity in winding up the affairs?

A. No; I do not think so——

Q. How could the liquidator pay—— A. (Continuing:) I see what you mean. You mean it would not pay the money back to the company?

Q. That is right. It would disregard the corporate entity? A. Yes.

253 Q. Is it correct to say that a British corporation for all purposes of winding up under the trading with the enemy legislation, or for all purposes of trading with the enemy, is treated in substantially the same manner as if the stockholders formed a partnership? A. Speaking generally I think the position is that a corporation is treated as a corporation, and it is not until you get to the stage of the proceedings in the winding up in which the interests of shareholders as distinguished from the corporation itself require recognition, that such recognition would be given to them at all. Speaking in a general way the law looks at the entity of a corporation alone.

Q. After liquidators have been appointed in the manner that the liquidators of Behn, Meyer & Company were ap-

pointed in the Straits Settlements, do those liquidators in dealing with the rights of persons under subsection 9 of section 4, look behind the corporate entity? A. Yes. At least when I say they do, while I can not give you a case in which they have done so, because I do not know of one, yet I think it is their duty to do so.

Q. And when it says that such winding up shall be subject to the just rights of any other persons, that it shall be carried out for the benefit of the persons entitled to the profits of said trade, the liquidator would ascertain whether or not there were non-enemy stockholders before he turned over the assets of the corporation to the custodian of enemy property. A. I think he would do so. I know that in cases of firms he has done so, although the whole property of the firm under that section might
254 ordinarily be paid to the custodian, he has paid the non-enemy partner's share out, and has not paid that to the custodian.

“If a corporation organized under the laws of the United States was doing business in the Straits Settlements and one-third or more of the stock of that corporation was owned by subjects of citizens of Germany and the Governor of the Straits Settlements appointed a liquidator for the affairs of the corporation in the Straits Settlements, the American corporation might try to secure from the liquidator those assets that he had. They might go to the Governor and lay before him a case showing that although this was an enemy company within the definition of the ordinance, yet it was not a company the affairs of whose trade must be wound up. Then the Governor might revoke his order and allow the corporation to continue to do business. As a matter of right, I do not think such a corporation as a corporation could recover the assets from the liquidator. If the affairs of a corporation organized under laws of the United States which was doing business in the Straits Settlements, one-third or more of whose stockholders were subjects of German, were subjected to liquidation in the Straits Settlements, in the course of that liquidation I think the liquidator would ascertain who the stockholders of the American corporation were and would endeavor to apportion to those stockholders in respect of whether they were enemies or non-enemies their

proportionate share of the assets in the Straits Settlements."

255 Q. So that he would even in that case for that purpose disregard the entity of the American corporation? A. Yes, sir; but I suppose in such a case he would probably pay any moneys receivable, or he might pay any moneys receivable to the proper officers of the corporation. I do not know what the stipulations might be that would be made before those moneys would be paid over. But I think he would ascertain the shareholders, if possible.

Q. And endeavor to have that proportion of the business of the Straits Settlements which would naturally be apportioned to those shareholders, paid to them rather than to the corporation and which might otherwise indirectly reach the enemy? A. They would surely want some stipulation, or some safeguard against the payment of money to an enemy subject.

On cross-examination by Mr. Kresel Mr. Mundell testified as follows:

"Assuming this same American corporation having a place of business in the Straits Settlements, having some German stockholders but the amount of this German stockholding being less than one-third, and the Governor undertaking under such circumstances to appoint a liquidator to wind up the trade of that company in the Straits Settlements, that American company under those circumstances would certainly as a matter of right be able to recover its property. So that the right to recover property seized in the Straits Settlements belonging to a foreign corporation depends upon whether that corporation was or was not under the laws of the Straits Settlements an enemy

or an enemy company. Under the laws of the
256 Straits Settlements I do not think that anyone other than a British, Scotch or Irish lawyer can practice in the courts of the Straits Settlements. I have heard of a case of a colonial solicitor, a solicitor of Australia, who was admitted to the bar of the Straits Settlements. That was an exceptional case and he got a certificate from the English authorities that he was a lawyer entitled to practice as an English solicitor and as such he was admitted.

An English barrister may be appointed a judge of the highest court. A solicitor can be appointed and Mr. Justice Thorne was appointed last month or the month before, he being an English solicitor. But the English solicitor must have practiced in the colony. As an English solicitor he has no right to be appointed to the bench of the colony. An English barrister may be appointed to our Supreme Court whether he has or has not practiced in the Straits Settlements, but in practice he has never been appointed. An English solicitor may be appointed to the Supreme Court provided he has practiced in the Straits Settlements for ten years. I have practiced in the Straits Settlements since 1908. I have also practiced in the courts of the Malay Federated States. Our firm has represented the successive liquidators of Behn, Meyer & Company, Ltd., from the commencement of that liquidation. Our firm now represents the liquidators of Behn, Meyer & Company. We do not generally represent the custodian of enemy property of the Straits Settlements. With reference to Behn, Meyer & Company, Ltd., we represented him only in connection, as I recollect, with the preparation of this
257 power of attorney which was put in this morning (Liquidators' Exhibit 27). I drew that power of attorney very shortly before I left the Straits Settlements. I did not draw the three vesting orders which were put in evidence this morning (Liquidators' Exhibits 24, 25 and 26). I do not think our firm did anything whatever further for the custodian of enemy property than drawing the power of attorney.

“A part of the common law of England is a part of the common law of the Straits Settlements. The common law of England is modified by the charters of the Straits Settlements. These Straits Settlements were constituted a Crown colony by a charter from England. Appellate Court decisions of England are recognized as binding upon the courts of the Straits Settlements in like matters and under like conditions. Our own companies law is similar to the English law but we go under our own law and not under the English law.”

Q. Yes, of course you have your own Companies Ordinances, but the point that I want to develop with you, if I am correct about it is this, that the general law of corporations, the general law of partnerships, the general law of insurance and banking in the Straits Settlements is the same as it is in England. A. Mercantile law in general is the same.

Q. Yes. And now when we come to war legislation I think you stated upon direct that your war legislation was modeled upon that of England. And that was true, wasn't it, with reference to all the colonies of England? A. To some extent, yes, it is modeled on that of England.

Q. In other words, it was the British Empire that was at war with Germany, and all the Colonies were helping? A. Yes.

Q. And one way in which they helped was to make their war legislation a component part of that of England, that is true, isn't it? A. Well, I don't think it was so in
258 connection with the Alien Enemies Winding-up Ordinance.

Q. Well, was it with reference to the Trading with the Enemy Ordinance? A. The Trading with the Enemy Ordinance, yes, sir.

Q. Now, as to the Straits Settlements legislative system, you have no elected legislature as distinguished from appointed, have you? A. To some extent we have, but it is a very limited extent. The Chambers of Commerce of Singapore and Penang are entitled to nominate a member of the Legislative Council and to the best of my recollection the member in Council nominated by the Singapore Chamber of Commerce is treated as the senior unofficial member on the Legislative Council. Other than those two appointments I think all members of the Legislative Council and all members of the Executive Council are appointed by the Governor.

Q. In other words, your legislature as such consists of a Legislative Council, and that Legislative Council consists of members of the Executive Council and of such others as the Governor, under the King's instructions, may appoint? A. No, I think you are wrong. I do not think the Legislative Council necessarily consists of the Executive

Council. The Legislative Council, as far as I recollect, consists of twelve official and twelve unofficial members. The members may have been increased recently, but they did consist of twelve official and twelve unofficial members.

Q. Well, now I am not going to quarrel with you about the designation of this Executive Council, but is it not the fact that your Legislative Council as distinguished from the Executive Council consists of official and unofficial members, the latter of whom are appointed by the Governor in pursuance of instructions received through the Secretary of State? A. Yes, that is correct.

Q. And that in accordance with such instructions
259 the Governor invites the Chambers of Commerce at Singapore and at Penang to nominate each a member? A. That is so.

Q. And is it not the fact that your Supreme Court has held that such an invitation does not confer any legal right or franchise upon those Chambers of Commerce? A. That may be. I am not aware of that case. That may be so.

Q. But with the exception of such invitation as the Governor may issue to the Chambers of Commerce at Singapore and Penang, the Legislative Council is an appointive body? A. Yes, sir.

“The Straits Settlements Companies Ordinance is modeled upon the English Companies Act. There is no provision in the Companies Ordinance making it necessary for shareholders or Directors of Straits Settlements Corporations to meet in the Straits Settlements. There is no express provision in the Articles of Association of Behn, Meyer & Company, Ltd. that meetings of shareholders or Directors must be held in the Straits Settlements. If the Articles of Association of a company provided expressly that shareholders must meet in the Straits Settlements and if, notwithstanding that, all the shareholders who lived in England being all the shareholders of the company had a meeting in England, actions taken at such a meeting would not be void ab initio on that ground. It is the view of the courts of England that, notwithstanding express provisions in the Articles of Association that meetings must be held at a certain particular place, if in fact all the shareholders get together some other place

they have a right to meet and that is also true with reference to Directors. No matter what the Articles of Association provide, if in fact all the Directors get
260 together, they have the right to transact business provided their actions are not called in question by the shareholders. In the matter of the meetings of the shareholders and Directors which were held in December, 1921, in Hamburg, the actions were not void ab initio but as far as the Directors were concerned the shareholders might avoid their action. If the shareholders had knowledge of and participated in the meeting of the Directors they could not be heard to complain even if the Directors met irregularly. I do not regard the meeting of the shareholders as being either void ab initio or even invalid if in fact the Directors did not appoint the place where the shareholders should meet."

Q. All right. And of course under Section 99 of the company's Articles of Association you have in mind it is provided that all acts done by any meeting of the directors or by a committee of directors or by any person acting as a director, shall, notwithstanding that it shall afterwards be discovered that there was some defect in the appointment of such directors, or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director? A. That may so state in the Articles.

Q. Now in the face of that you do not express the opinion, do you, that because these directors did not at the time when they met in Hamburg each of them have one share of stock, that their acts were either void or invalid? A. In face of that I have no objection to raise to the meeting of the 13th of December, 1921.

* * * * *

Q. Let me remind you. The Consulting Committee meeting was held on the same day as the meeting of shareholders and directors, and at the same place. The Consulting
261 Committee at that meeting approved the action at the meeting of the shareholders and the directors. All the members of the Consulting Committee were present. Now I ask you whether in view of those facts it

is your opinion that that meeting was void or invalid? A. No, in view of those facts the meeting as such was not void or invalid.

Q. I ask you whether any act or action taken at that meeting was in your opinion void or invalid? A. Yes, I am still of opinion that the action taken at the meeting of shareholders, the meeting of directors and the meeting of the Consulting Committee was invalid.

Q. Speaking now only of the Consulting Committee, if you please, upon what ground do you say in your opinion the action of the Consulting Committee was invalid? A. No, perhaps the Consulting Committee stand on a different ground from the directors and the shareholders. Perhaps I am wrong in making that statement, that opinion.

Q. Yes, I had sufficient confidence in your ability to believe that upon consideration you would conclude that. You have in mind, of course, that in so far as the place of meeting of the Consulting Committee is concerned the Articles of Association clearly indicate that they were to meet in Europe, do they not? A. Oh, I was not thinking of that at all.

Q. Well, I am pointing that out. A. Yes, yes, I know.

Q. You also have in mind the provisions of Article 107 which define the powers of the Consulting Committee, so that we have it now that as far as the Consulting Committee is concerned you find no fault with the meeting or with the exercise of the powers that they exercised at that meeting. Very well. A. That is so.

“There is nothing in the Companies Ordinance of the Straits Settlements or in the common law of the colony which refers to such a position as consulting committee. Under English law applicable in the Straits Settlements as in England the Article of Association constitute a contract between the members and the company. Any agreement in the Articles of Association unless it is prohibited by the Companies Ordinance or by the laws in some other way, or inconsistent therewith, constitutes a good, valid, binding contract. Of course, the contract contained in the Articles cannot be contrary to the Memorandum of Association or the ordinance or the law of the colony.”

Q. Now speaking of the ratification, I shall not go into those one by one. They have been introduced in this case, as you recall, ratifications by stockholders of the action at the stockholders meeting in December, 1921. Ratification by the directors of the actions taken at the directors meeting on the same day. Now, I understood you to say on the direct that all those ratifications are invalid, and have no force at all, am I correct about that, A. I think so.

Q. Yes. Well, I wonder whether the English law and the Straits Settlements law differs in this respect from our American law. Do you mean to say that generally speaking a person may not ratify something that he could have done before, A. No.

Q. No. Well, then, take the position of a stockholder. Such stockholder has a right to attend a meeting
263 of stockholders and to exercise his power of voting upon any measure that might be presented. He may do that in person or he may do that by proxy, isn't that right? A. Yes.

Q. That is the law of England and the Straits Settlements, isn't it? A. Yes.

Q. And was at the time of this meeting in December, 1921? A. Yes.

Q. I understood you to say on the direct that the reason why you say these ratifications by stockholders were invalid was because the stockholder had a right to have a chance to be heard at the meeting? A. I said that was one of the reasons.

Q. One of the reasons? A. Yes.

Q. In other words, let us see if I understand it. That because a stockholder who was absent from a meeting of stockholders had a right, if present at the meeting, to have — be heard in debate, that he has no right subsequently to ratify what was done. A. No, I do not suggest, Mr. Kresel, that the ratifications per se have any objection except in two cases.

Q. Wait a minute, please. I do not want to wander away from this point. Do you or do you not say that the ratification by stockholders was invalid because the stockholder, if present at the meeting, would have had a right to be heard? A. No, I do not.

Q. You did say that, didn't you, upon your direct? A. I don't think so, no.

264 Q. What did you say? A. My recollection is that I said that a corporate act has to be performed in accordance with the Articles. That a shareholder alone could not do something which was required to be done by a corporate act in his individual capacity.

Q. Now you will excuse me if I take just a moment to turn to your testimony on this subject, because I should like to know whether you were correctly reported on that subject. On page 394, the question was this:

“Q. * * * Will you kindly state what, if any legal effect those attempted ratifications by the shareholders had upon the validity of the original proceedings?”

And your answer was this:

“A. I should be of opinion that if a company is to do a corporate act it must do that act in accordance with the Articles of Association, that corporate act, such as the passing of a resolution of the shareholders, must be passed at a meeting, and the ratification does not effect in law anything at all; because the members or partners who make the ratification have no chance of hearing any discussion at the meeting. Of course that may seem a technical objection to make, but it seems to me it is a legal objection.”

The Witness.

A. Yes.

By Mr. Kresel:

Q. Are you correctly reported there. A. I think so, yes.

Q. One of the reasons why you think this ratification is invalid is because the stockholder had no chance of
265 hearing any discussion at the meeting? A. No, he has not done a corporate act in the manner prescribed by the Articles of Association.

Q. I would like to keep your attention on that particular part where you speak of the stockholders having no chance to hear any discussion at the meeting. Do you really say so, that that is a good reason for saying that the ratification is bad? A. No, I do not.

Q. No. All right. I will take the other part of it then. You say that the ratification is bad because action by stockholders should be taken at a meeting, and not outside?
A. A resolution.

Q. Of course if the man had been present at the meeting there would be no question of ratification, you can see that, can you not? A. Certainly.

Q. So that we come down to this, do we not, that in your opinion there is nothing wrong with the ratifications by these stockholders of the action taken at the stockholders meeting in December, 1921? A. Nothing wrong with the ratifications per se.

Q. Certainly. In other words, whatever the stockholder had the right to do at that meeting he has a right to ratify? A. Certainly.

Q. And the same is true of the directors? A. Yes.

Q. Under your Companies Ordinance a distinction is drawn between a general meeting and an extraordinary meeting. A. Yes.

266 Q. Let me see if I can state in a few words the distinction, and you will correct me if I am in error. A general meeting is a meeting at which a majority may act, whereas an extraordinary meeting, in order to pass a resolution, it takes three-quarters of the votes. Isn't that right? A. No, I think, with deference, it is not right. I think that a general meeting—did you say general or ordinary general?

Q. I said general. A. Yes, I think that is right.

Q. All right. You will find it, if you care to refer to it, at sections 80 and 171 of your Companies Ordinance. Now directors may be elected at a general meeting? A. Yes.

Q. In other words, it does not take a three-quarters vote to elect directors? A. No.

Q. Have you in mind, Mr. Mundell, the provision of the Articles of Association of this particular company to the effect that all acts of directors are subject to regulation by extraordinary resolution? A. Yes.

Q. You find that at Article 104. Now let us see what that means. Interpreted in the light of the definition of an extraordinary resolution that would mean that whenever the stockholders by a three-quarters vote direct anything to be done that the directors have to do it? A. Yes.

Q. And as a corollary to that, whenever the stockholders by three-quarters vote so resolve they can override anything the directors may have done? A. No.

267 Q. Now if you are in doubt about that—— A. I do not think they can.

Q. You do not think they can? A. No.

Q. Well, let me read you the provisions of Article 104:

“The management of the business and the control of the company shall be vested in the directors, who in addition to the powers and authority by these presents expressly conferred upon them, may, subject to the provisions hereof, exercise all such powers and do all such acts and things as may be exercised or done by the company, and are not hereby or by ordinance expressly directed or required to be done by the company in general meeting, but subject, nevertheless to such regulations not being inconsistent with the provisions of the Ordinance or with these presents, as may from time to time be made by extraordinary resolution.”

Now let us go over that language again: “subject, nevertheless to such regulations as may from time to time be made by extraordinary resolution.”

Do you mean to say, sir, that under that provision, if the board of directors had at a meeting voted to hire this building next door here, and that before the lease was concluded the shareholders had passed a resolution by three-quarters vote disapproving that, that that would not override the action of the directors in that regard? A. I think it might not. I think that, although as between the company, the members and the directors, the members have

the right to override the powers of the directors,
268 they may be unable to do so—I am not sure, but I am inclined to think that it makes a proviso that nothing done by a resolution shall invalidate any prior act of the directors.

Q. “But no regulation”—you are quite right, I should have continued reading—“But no regulation shall invalidate any prior act of the directors which would have been invalid if such regulation had not been made.” A. Precisely.

Q. In other words, if the directors had acted and such regulation would have been valid if made, then it could not be over-ridden. But in so far as subsequent acts are concerned, it could be over-ridden? A. Yes.

“Under Section 89 of the Articles of Association a resolution signed by owners of three-fifths of the stock is as valid as a resolution of a general meeting. Assuming that Mr. Laspe and Mr. Witthoefft held the shares I think that the resolution dated November 3, 1926, was such a resolution as is contemplated by Section 89 of the Articles of Association. It is the law as I understand it that a single shareholder may commence an action in the name of his company. And if anyone objects to the authority of that shareholder to maintain the action in the name of the company, if necessary the Court will cause a meeting of shareholders to be held to find out whether a majority of the shareholders are in favor of maintaining the action. And if the court is convinced that the plaintiff before it who has brought the action in the name of the company owns more than a majority of the stock the court will even dispense with holding a meeting for the purpose. There are certain exceptions such as if the bringing of the action might deprive a minority of their rights
269 or if the action was to set aside something ultra vires the company or in the case of fraud. In a number of cases of that kind a single shareholder could maintain a suit, but in such an event he does not sue in the name of the company.

“The war did not deprive German stockholders in an English company, who were in Germany, of their rights, but only suspended those rights during the pendency of the war. If German directors of an English company were in Germany, their power to direct was similarly suspended.”

At this point in the proceedings Mr. Gordon on behalf of the plaintiffs in Equity 45881 asked that an order be entered allowing the filing of a supplemental bill of complaint.

270 Mr. Kresel objected that certain of the allegations in the proposed supplemental bill were hypothetical and further that the power of attorney had been in the possession of the plaintiffs in Equity 45881 for months and that it should have been pleaded before. The Chief Justice stated that in his opinion the pleading was bad in that it was argumentative, did not state ultimate facts but stated evidence. The following then occurred:

The Court: Whether or not you may bring in the fact that this resolution was adopted would depend upon your necessity for doing so, and if I thought it were necessary for you to do it without hesitation I should allow you to plead it. I will pass upon that later. But my present thought is that it is merely evidence.

Mr. Gordon: We really took the same position. We are only doing it for our own protection.

The Court: I understand.

Mr. Gordon: If either one of the other parties here thinks it is unnecessary that may be the end of it.

The Court: If I should deny your motion for leave to file on the ground that it is unnecessary; that is, on objection made that it was unnecessary to do so, then nobody could ever raise the point later that it was necessary. Your resolution is in evidence subject to objections as to whether anybody had the power to do the thing, and that gives the right to you in this case to show as to what your standing as Behn, Meyer & Co., Ltd. is in this action. If in law you have a standing on proper authority, and if when you came into court you did not have the proper authority, and if this resolution is a ratification of that which was done without authority, that is a matter of evidence
271 which shows that no matter what you were when you came you are now in here, and the suit is actually filed after all for Behn, Meyer & Co., Ltd.; and that was saying that perhaps without this resolution you would have to go out of court. If this resolution accomplishes anything it keeps you in court. That is my general view about it. However, I will think this over, and there will be no prejudice any way around.

Mr. Gordon: If the ruling is that it is disallowed because it is unnecessary, it seems to me that that protects us and leaves everything in the position that if Mr. Stanley is——

Mr. Stanley (interposing): Of course I am not concerned particularly in the matter of——

The Court (interposing): Suppose the parties consent to this, and there are questions of law which come up to determine whether or not this resolution means anything; like all other questions of law in the case I have got to decide them later. All those questions have been reserved,

and may be reserved as to this resolution as a bit of evidence. If that is the only point your opponents make, that suppose you did pass this resolution it did not amount to anything, why, then, it does not need to be filed. And if that is the point that Mr. Kresel and Mr. Stanley take I will deny the motion for leave to file the supplemental bill because it is unnecessary to do so, and your evidence may be considered subject to all legal objections to its admissibility, and that is an easy way out of it.

Mr. Kresel: The only point we have, your Honor, is that we say that as to this power of attorney, and this
272 related resolution of the 31st of January, 1927, they should not have been used against us without having given us some notice thereof before we came here to try this case. So far as that supplemental bill is concerned, any disposition that your Honor makes of this motion is really a matter of no consequence.

The Court: I will think it over and see how technically it should be handled.

273 Mr. Stanley at this point called attention to the fact that the second paragraph of the resolution of January 31, 1927, (Liquidators' Exhibit 28) purports to disaffirm and secure the dismissal of Equity No. 40361 and asked that the liquidators be required in open court to disaffirm any rights in anything that Mr. Kresel might secure in that case for his plaintiffs. The following then occurred:

The Court: Oh, well, I think off hand that is what somebody says is the fulness of hope, and does not amount to anything in the world.

Mr. Kresel: It is an expression of hope.

The Court: Yes; the substance of things hoped for, and evidence of things not seen. Behn, Meyer & Co., Ltd. liquidators are not parties to the stockholders' suit of Behn, Meyer & Co., Ltd. They have no standing of any kind or description in it; they cannot move to dismiss it, and cannot do a single thing about it. Therefore a resolution of the liquidator stockholders or whatever you may want to call them, calling upon the stockholders of Behn, Meyer & Co., Ltd. to discontinue the suit does not amount to anything in the world. If they want to come into the suit No. 1 of Behn, Meyer & Co., Ltd. that would be a different matter.

Mr. Kresel: Of course, your Honor, it is quite apparent—and if that is not the intention of Mr. Gordon, I take it Mr. Gordon will certainly make his contention clear—it is quite apparent that what Mr. Gordon is trying to do by this supplemental bill is to take advantage of the legal situation for the benefit of the liquidator but not for the benefit of the United States. In other words, he comes in here and says to me and my client: You get out of my way. But he does not say get out of the way of the Government. I think that Mr. Gordon should make that clear, whether I have correctly interpreted his position. If I have not I should like to know.

274 The Court: I did not read with care your stipulation.

Mr. Kresel: All that that did was to outline the order in which the parties were to proceed. Except for that it had no effect.

The Court: When cases are tried together by consolidation for the purpose it simply means that the facts altogether, or nearly altogether, are such facts as would be developed ordinarily in either case if tried separately. That is all. It is just the trying of one case so to speak instead of the trying of two, and you will bring out everything in one that you would bring out in the other if you tried them separately. So far as anything in one case is concerned, coming in through Mr. Stanley's cross examination we will say, so far as anything that is brought out is concerned, it has either to do with your case or Mr. Gordon's case or it has not. If it has it may be considered but in that case. It would have nothing to do with this case—well, I suppose as a judge I would not have anything to do as to the effect of the decision in your case from the decision in their case merely as a decision. I would pass upon the facts and try to find out whether a cause of action has been shown by you. I will take everything that is relevant in my opinion and endeavor to determine whether a cause of action has been proved in favor of Mr. Gordon's clients. When I get through with these two cases, and when I reach a decision, they will be separately decided. I may be wrong in both, or wrong in one and right in the other; but one cannot be pleaded as a judgment or used in judgment

against the other. They are entirely separate and distinct as I look at the situation now.

Mr. Stanley: I simply want to make myself clear:
275 This resolution is not a resolution of the liquidators but purports to be a resolution by the stockholders who claim to be the successors of the Germans. These are the same people, that is, the Germans are as stockholders, and Mr. Kresel represents them. Since he has got into the suit someone else comes in and says that he is the successor of Mr. Kresel's clients. Now, I realize the ridiculous situation of this document here, but it is introduced seriously and I do not want any misunderstanding of my position in the matter.

Mr. Kresel: Don't you see that the Court when it comes to decide this case, will have to decide who the proper stockholders are. That will naturally take care of the attempt by this resolution to exercise the rights of stockholders. If the court decides that they are the stockholders then this resolution is all right, and has effect, otherwise not.

The Court: If they are not it has no effect.

Cross-examination of Mr. Mundell was then resumed by Mr. Kresel, and on such cross-examination he testified as follows:

"It is the rule in the Straits Settlements that English authorities upon acts in *pari materia* are authority for the interpretation of colonial acts. Generally speaking all English authorities whether appellate courts or courts of first instance are binding in the Straits Settlements provided they are authorities upon acts in *pari materia*, but the courts of the colony have on more than one occasion said that they are not bound by a judgment in the court of first instance. They are bound by the judgments of the
Court of Appeal. They consider that, and of course
276 every decision even of a court of first instance, is generally followed. But I have known occasions where those decisions have not been followed. I did not cooperate in drawing the resolution dated January 31, 1927. It was not my draft at all. The draft was submitted to me and Mr. Doing before it was actually settled. I made suggestions with reference thereto as far as I agreed with the

draft. I did not draw the three vesting orders which have been introduced in evidence nor did my office. After a communication from Coudert Brothers my firm wrote to the Government suggesting the vesting orders should be made and they were."

Q. Now, Mr. Mundell, you spoke with reference to your construction of section 4, subdivision 1 of the Enemies' (Winding-up) Ordinance. You spoke of a provision in the Treaty of Peace or Treaty of Versailles, making it obligatory upon Germany to deliver to the Clearing House within six months after the Peace Treaty went into effect all stock certificates covering property subject to the charge under the Treaty you remember that? It reads:

"Germany will within six months from the coming into force of the present Treaty, deliver to each Allied or Associated Power all securities, certificates, deeds, or other documents of title held by its nationals and relating to property rights or interests situated in the territory of that Allied or Associated Power, including any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that power."

Now did you mean by that, Mr. Mundell, to convey to the Court the impression that the stock certificates of the stock of Behn, Meyer & Company, Limited were at the
277 time of the making of this Treaty in Germany? A.
No.

Q. You know, do you not, that these very stock certificates were in the hands of the Enemy Custodian of the Straits Settlements up to 1923? A. I have heard so, yes.

Q. Yes, And that in 1923 your Alien Enemy Custodian returned those certificates, together with the stock certificate books and the stock register to these German stockholders, you know that, don't you? A. Well, I don't know that. I think that is incorrect.

Q. Well, you mean to say, Mr. Mundell, that you do not know that the Custodian of Enemy Property of the Straits Settlements returned those certificates and the books that I have mentioned to the German stockholders? A. My recollection is this, that those books and those certificates were handed over by the Liquidator.

Q. To whom? A. To Mr. Overbeck, I think.

Q. Representing the German stockholders? A. Representing Behn, Meyer.

Q. The German stockholders? A. Yes, the German stockholders.

Q. And that that was done in 1923—no in 1925, I beg your pardon, I misled you. I think it was last year.

Q. 1925? A. Yes.

Q. Not last year, it was the year before. This is '27. You know, too, do you not, that before the Liquidator handed over, returned these certificates and the books
278 that I have mentioned to Mr. Overbeck, he obtained leave to do that from the Custodian of Enemy Property of the Straits Settlements?

Mr. Stanley: Pardon me, I do not know what effect this may have upon my case, but if the witness is not speaking of his own knowledge I want that brought out.

Mr. Kresel: I am asking him of his own knowledge.

Mr. Stanley: And what the instructions were by the Custodian of Enemy Property as to handing over these books to the Germans.

By Mr. Kresel:

Q. Will you answer the question? A. I do not know, Mr. Kresel, about that. I thought he had some kind of permission from some Government official.

Mr. Stanley: Well, now——

Mr. Kresel: Just a moment, please. I will develop it, and if it is not accurate, you may.

By Mr. Kresel:

Q. Don't you know? You were acting for the Liquidators. A. I personally was not acting. I have no personal knowledge about it at all.

Q. Well, your firm was acting for the Liquidators? A. Yes, my firm was acting for them.

Q. In this very matter? A. Yes.

Q. All right. Now I am asking you whether it is not the fact that before the Liquidator returned these stock certificates and these corporate records he obtained leave to do that from the Custodian of Enemy Property? A. I do not know.

Q. That answers my question. Q. * * * Now
279 at the last hearing, Mr. Mundell, I took up with you
with reference to the regularity or the irregularity
of these meetings of the stockholders and directors and the
consulting committee certain of the objections that you
raised to the validity of such meetings upon your direct.
The objections that I have so far taken up with you con-
cerned the place of meeting, the notice given of the meeting,
the fact that the chairman of the directors had the right
under the Articles of Association to preside at meetings of
stockholders, and the fact that some of the directors did
not have the qualifying share of stock, and the fact that
the directors did not appoint the place at which the meet-
ings were to be held. You remember that? A. Yes.

Q. All right. Now as to all of these irregularities I
understand you now to say, and to have said at the last
hearing, that none of these objections, nor all of them to-
gether, invalidate the action taken at those meetings? Am
I right about that?

By Mr. Kresel:

Q. Now do you understand the question? A. Yes. As
to the meeting of the 13th of December, I think it was,
1921, I think none of those irregularities would invalidate
anything validly done at those meetings. I mean anything
properly done, otherwise unobjectionable.

Q. Well, would they invalidate the action taken at those
meetings? A. Those objections would not.

280 Mr. Mundell continued:

“At the meetings held in December 1921 the resolution
authorizing the bringing of this action was contrary to the
provisions of Article 297 of the Versailles Treaty prohibit-
ing German owners from disposing of property subject to
the charge.”

281 Q. Now I would like you to turn to Article 297 of
the Treaty of Versailles. Subdivision (b) of that
Article.

The Court: What article, Mr. Kresel?

Mr. Kresel: Article 297. I should be glad if your Honor
will follow us.

By Mr. Kresel:

Q. By Subdivision (*b*) of that Article it is provided that:

“The Allied and Associated Powers reserve the right to retain and liquidate all property”—

I will skip to the intermediate portion—

“belonging at the date of the coming into force of the present Treaty to German nationals or companies controlled by them within their territories, colonies, possession and protectorates.”

Under that neither England nor the Straits Settlements were entitled to any charge on German property that was not within their territories, were they? Isn't that right?

A. I do not think this section (*b*) was referring to the property the subject of the charge, necessarily the subject of the charge. It may have been part of the property subject to the charge.

Q. Well, we have got to take it up one by one. A. Yes.

Q. Now under that subdivision I say the Straits Settlements and England, were entitled to a charge only upon such property as was within their territories, isn't that right? A. Yes.

Q. Now you have said that what the Liquidator claims here is a chose in action? A. Yes.

Q. That chose in action was situated in the United States, wasn't it? A. Yes.

282 Q. So that under this subdivision (*b*) there is no right in the Liquidator to what he is here claiming, is there? A. Well, as I read that it says they are entitled to retain and liquidate all property.

Q. Within their territories? A. Within their territories.

Q. Now here you have the property, is a chose in action in the United States? A. Yes.

Q. Certainly that is not within the territories of England or the Straits Settlements, that is right, isn't it? A. That is so.

Q. So therefore you can not found any right of the Liquidator on that subdivision of 297, can you? A. I think I can.

Q. Well, you have been able to do many things, Mr. Mundell. I should like you to point out to the Court how you

do it? A. The assets in this suit are certainly, I think, a chose in action in the United States. But the shares in the company——

Q. Pardon me a moment. And that is what the Liquidator is claiming, isn't it? A. Yes, sir.

Q. The chose in action here in the United States? A. Yes.

Q. All right; now go on. A. But the shares in the company were property within the territory of the Straits Settlements.

Q. But the Liquidator is not claiming the shares of stock, is he? A. I am explaining to the Court, Mr. Kresel, how I based my opinion.

283 Q. Well I know that, but I am taking up that opinion as you go along, if you don't mind. A. Well, if you don't mind I should like to continue with my opinion.

Q. You do not want to be interrupted? A. I should rather give my opinion, and then question, if you please.

Q. All right, I shall not interrupt you. A. The shares I think of the German shareholders were property within the territory of the Straits Settlements and therefore property within subsection (B) of Article 297, and subject to the charge. Now the German owners under this Article (b) are not able to dispose of such property, rights or interests, nor subject them to any charge without the consent of the Straits Settlements. Now by calling these meetings and giving directions with reference to the chose in action in this suit they are effecting to dispose of the share-holding interest to some extent, because in so far as they collect the assets of the corporation they depreciate the value of the shares, which is part of the property subject to the charge, and in my opinion they have no right to do that.

Q. Now, have you finished? A. Yes; on that point.

Q. Assuming that all you say is a fact, without conceding it, what it amounts to is this: That in your opinion the shares of stock of Behn, Meyer & Company, Limited were within the territory of the Straits Settlements? A. Yes.

Q. And that the action taken by the stockholders at their meeting of December 13, 1921, affected those shares of stock. A. Yes.

Q. All right. A. Affected the values of those shares of stock.

284 Q. All right. But the liquidators' rights here are not based upon their position as a stockholder in Behn, Meyer & Company, Limited, are they? A. No.

Q. He never was a stockholder, was he? A. No.

Q. He does not even now claim to be a stockholder? A. No.

Q. All right. A. No, I will not say that. I may be wrong in saying that, Mr. Kresel.

Q. What do you mean by saying you may be wrong in making that statement? A. I mean that the liquidators might not possibly claim to be stockholders, that I might be wrong in that.

Q. I thought the custodian of enemy property now claims to be the stockholder, are we wrong about that? A. The custodian of enemy property is certainly the stockholder.

Q. In addition to that does the liquidator also claim to be a stockholder? A. I believe the liquidator may be a stockholder.

Q. What do you mean when you say "he may be a stockholder?" Is he or not? Does he claim to be a stockholder or not? A. I believe Mr. Clarke is now a stockholder.

Q. Some stock has been put in his name, is that what you claim? A. I believe so, yes.

Q. All right. Now to come back to the point: The charge, insofar as it refers to this company, which can be enforced in the Straits Settlements, is a charge upon the stock of Behn, Meyer & Company, Limited, is not that right,
285 and not upon the chose in action in the United States? A. That is so. The charge can be enforced on the stock.

Q. So that insofar as you find fault with the actions taken at the meeting of stockholders in December, 1921, upon the claim that what was done there was contrary to Article 297 of the treaty, that refers to the rights, if any, of the custodian of enemy property under his present claim of stockholding, is not that right? A. To some extent, yes.

Q. And that that does not at all affect any charge on the chose in action in the United States because if anybody was entitled to that charge it was the United States and

not England or the Straits Settlements, is not that right?
A. No; I do not agree with that necessarily.

Q. Do you contend that the Straits Settlements or England is entitled to a charge on the chose in action in the United States? A. No.

Q. Well, then, you did not understand my question. I say that insofar as any charge is concerned under the treaty of peace upon the chose in action in the United States, and the money in the Treasury of the United States which is the proceeds of the liquidation in the Philippine Islands, that charge, if it belongs to anybody belongs to the United States. A. Yes.

Q. That leads does it not to this conclusion: That insofar as Section 297 is concerned and the charge therein referred to, nothing that was done at the meeting of the shareholders or directors on December 13, 1921, had any effect thereon, and could not under the circumstances, is
286 not that right? A. I do not think that is quite right, Mr. Kresel.

Q. Do you mean that the resolution passed at the meeting authorizing Mr. Martens to begin suit here affected the charge which the United States might have had on this property? A. No; I do not mean that.

Q. Do you consider that the resolution passed at that meeting authorizing certain attorneys to act as attorneys in that suit affected the charge which the United States might have on this property? A. No.

Q. Now, after they began the action, and I put the general question again: Do you say what was done by the stockholders or directors at those meetings in December, 1921, had or could have had any affect upon the rights of the United States to charge the property under the Treaty of Versailles? A. No.

Mr. Stanley: Your Honor, of course that is asking the witness a question as to the law of the United States, if these treaties are in force here. I want it strictly understood that I am not objecting to that, and that I am not bound in any way as to the opinion of the witness on the effect of the provisions of the treaty upon the Government's rights.

The Court: Mr. Mundell said they had no effect.

Mr. Stanley: Pardon me, but he said that the action of those directors in Germany could not affect the charge on the rights of the United States. It might be to our advantage to argue that that was the very thing they were trying to do, and that it was in violation of the treaty and therefore their action can not be considered as binding upon the court, as affecting the rights of the Alien Property Custodian; that it works the other way round.

The Court: That is what he said, that the action of the stockholders and directors, in December 1921, so far
287 as the United States are concerned was absolutely ineffectual.

Mr. Kresel, continuing:

Q. And so far as the liquidator of the Straits Settlements is concerned, and the Straits Settlements Government and the Government of England, those acts of the directors and stockholders were ineffectual because they did not have a charge on this property in the United States, is that right?
A. I think indirectly they had charge of this property.

Q. Now, that is what I wanted you to tell me. In other words, you claim that under article 297 of the Treaty of Versailles, which expressly says that the charges as to property within their territories, England and the Straits Settlements, had a charge on property in the United States Treasury?
A. Yes.

Q. That is your claim? A. Yes; indirectly.

Q. Well, that is very interesting. Now, another ground of objection that you urge—— A. (Interposing.) When I say a charge, I do not mean a charge under this section directly. I say indirectly.

Q. I understand you to say, Mr. Mundell, that under subdivision (b) of Article 297 the Straits Settlements and England had a charge on property which was the proceeds of liquidation of the Philippine branches of Behn, Meyer & Company, Limited, which proceeds are in the Treasury of the United States. That is what I understood you to say. Now, this is your time to say whether I am wrong or right.
A. Well, when I say charge I do not mean exactly what you mean.

Q. Never mind what you mean or I mean, but—— A. (Interposing.) I do not mean expressly what you mean.

288 I have already said they got no charge on property outside their dominions, but I think they still have the rights which the shareholders' interests in that property confer.

Q. But you have already agreed with me that what is here is not the stock but the proceeds of property? A. Yes.

Q. As to that do you attempt to say that either England or the Straits Settlements has any charge? A. There is no charge under the treaty on that property.

Q. All right, is there any charge under anything else? A. I think there is a charge on the shares and the interests——

Q. (Interposing.) I did not ask you about the shares——

A. (Continuing:) —and the interests conferred by the shares, and if those shares confer any interest in this property that property is subject to the charge.

Q. I am not talking about the shares. A. Well, that is my opinion.

Q. I wish you would confine yourself to the property in the Treasury of the United States. That is what we are dealing with here. A. I do not wish the Court to take an erroneous view of my opinion on that point, and I say that is my opinion.

Q. Your opinion is this, that insofar as the money in the Treasury of the United States, which consists of the proceeds of the sale or liquidation of the property of the Philippine branches of Behn, Meyer & Company, Limited, neither the Straits Settlements nor England has any charge thereon, is that right? A. Yes.

Q. All right. A. No direct charge.

Q. Either directly or indirectly? A. No, I have said I think indirectly we have a charge, and I stick to that opinion whatever you may say and however you may put your question.

289 Q. But your mature, considered opinion is, after giving the matter a great deal of thought, that the liquidator represented by Mr. Gordon here, under the appointment which has been put in evidence, appointing him liquidator of the affairs of the trade in the Colony, of Behn, Meyer & Company, Limited, is in fact the liquidator of the Company? A. Yes.

Q. In other words, that that appointment in that language gives to this liquidator exactly the same powers as if the appointment had read: You are hereby appointed liquidator of Behn, Meyer & Company, Limited? A. Yes. In my previous answer I ought perhaps to have referred to that section which gives the Governor the power to dissolve the company.

Q. And your opinion is that under this appointment of these gentlemen as liquidators of Behn, Meyer & Company, Limited, they are entitled to the assets of Behn, Meyer & Company, Limited, everywhere, all over the globe? A. Such as they can get, yes.

Q. I am not talking about what they may be able to get. I want to repeat that question: Your opinion is that under this appointment of these gentlemen as liquidators of the affairs of the trade in the Colony of Behn, Meyer & Company, Limited, they are entitled to—never mind whether they can get them or not, but they are entitled to all the assets of Behn, Meyer & Company, Limited, no matter where they may be? A. Yes.

Q. So that up to October 1915 you were of opinion that the liquidators of Behn, Meyer & Company were universal liquidators, taking everything by way of assets that Behn, Meyer & Company owned, any branch of it anywhere
290 in the world? A. Yes.

Q. And that included of course all assets by way of stock, securities wherever they were found? A. Yes.

Q. And that that included such assets in Manila, in Borneo, in Java, and wherever else there was a branch of Behn, Meyer & Company, Limited. A. Yes.

Q. And it was your opinion that up to October, 1915, this liquidator of Behn, Meyer & Company was entitled to control over all branches of Behn, Meyer & Company no matter where located? A. No; that was not my opinion.

Q. He was entitled to all the assets. A. He was entitled to call for the assets.

Q. To what? A. He was entitled to call or to claim the assets.

Q. Entitled to claim control of all branches? A. Yes.

Q. And you believed that the liquidator had the right as soon as appointed, to the possession of all the assets of these branches, including all choses in action, securities,

title deeds, share certificates in the possession of any of the branches, no matter where located? A. Yes.

Q. Well, now, Mr. Mundell, notwithstanding that opinion did you not advise the liquidators of Behn, Meyer & Company that they were not the liquidators of the company itself, and that they had no right to the possession of title deeds, share certificates, or choses in action outside the Straits Settlements? A. Do you mean that my firm
291 did so?

Q. I mean you. A. I do not remember ever having done so.

Q. You would not have been likely to have done so if you entertained the opinion you have just expressed, would you? A. I do not think so, no.

Q. Did you not advise the liquidators of Behn, Meyer & Company, Limited, that they were right in taking the position that they were not the liquidators of the whole business of Behn, Meyer & Company, Limited, but were liquidators only of the business of that company in the Straits Settlements? A. Would you mind telling me when you refer to?

Q. I mean before this change in October, 1915.

* * * * *

Q. All that I ask is whether you gave them that advice? A. I believe that my firm —

Q. (Interposing.) I am not dealing with your firm now but dealing with you personally. A. I might have done so. I might have given the opinion.

Q. I do not want you to deal in "I might haves." In view of your opinion as you have expressed it here today that you up to October, 1915, were of the firm opinion that those liquidators were universal liquidators, entitled to all the assets of Behn, Meyer & Company, Limited, no matter where situate, I am asking you in the light of that whether you did not prior to October, 1915, advise the liquidators of Behn, Meyer & Company, Limited, that they were right in taking the position that they were not liquidators
of the whole of Behn, Meyer & Company, Limited,
292 but only of the business of that company in the Straits Settlements. A. I may have done so.

Q. Well, did you do so? A. I do not know. I cannot remember. I may say that —

Q. (Interposing.) Well, now —

Mr. Gordon: Let him finish.

Mr. Kresel: Certainly.

A. I should like to say this for the moment, that I may hold a personal opinion on the law of a particular matter, but when an opinion is given by my firm I consult my partners and the opinion which the firm may give may not be an expression of my own opinion. It depends upon the circumstances.

Q. Now, in order that there should be no misunderstanding between us I want to repeat that I am not asking you what opinion your firm rendered but only what opinion you personally rendered. Do you still say now with that explanation that you may have prior to October, 1915, advised the liquidators of Behn, Meyer & Company that they were not the liquidators of the company, that they had nothing to do with the assets outside the Straits Settlements, but that all they were concerned with and all they took was the business of that company in the Straits Settlements? A. I may have done so.

Q. But you have no recollection of having done so? A. No.

Q. When you write an opinion, and I say you personally, for a client you express the opinion of your firm even though your personal opinion on the question at issue is contrary to the firm's opinion? A. It depends. In some cases after consultation with my partners an opinion goes out which expresses my view, and in some cases it goes out as expressing the firm's view and not my own view.

Q. In 1915 who were the members of your firm? A. Myself and Mr. Everitt.

Q. Well, do you say that in 1915 you personally may have expressed an opinion on this subject, and in the way that I have set it up, even though as you say it was not your personal opinion, only because it was your partners' opinion? A. Not only because of that, but because I recollect quite well that shortly after the passing of the ordinance we wrote the Government—

Q. (Interposing.) Well, you see I did not ask you about that. I do not want to go into any correspondence between you and the Government. A. I am explaining why the conclusion might have been given that did not express—

Q. (Interposing.) I asked whether you did in 1915 express an opinion on this subject which was not your opinion but was your partner's opinion? A. I cannot remember.

Mr. Gordon: Your Honor, I suggest that Mr. Mundell be allowed to finish his answers. He started out to make an explanation there and I think it was entirely responsive to the question.

Mr. Kresel: What he was going to say was about something else.

The Court: I think Mr. Mundell has answered the question, and he says he does not remember such a circumstance.

Mr. Kresel, continuing:

Q. Now, I should like to refresh your recollection.
294 I show you a letter dated 29th day of June, 1915, and ask you to state whether the signature to that letter is your signature. A. That is my signature.

Q. I ask you now to look at the letter and state whether you wrote it. You do not have to take time to read all of it in order to answer the question. A. It is marked with my initials.

Q. Which would indicate that you wrote it? A. I think so. It certainly is my signature.

Q. This letter is written to W. H. Macgregor, Esquire. Was he the liquidator of Behn, Meyer & Company, Limited? A. Yes.

Q. And it is dated the 28th day of June, 1915? A. Yes.

Q. And was written at that time? A. Yes.

Q. And that was before the universal character of the liquidator of Behn, Meyer & Company had been changed, according to you? A. Yes.

Mr. Kresel: If your Honor please, I now offer the letter in evidence, and show it to counsel on the other side. While they are looking at it I will ask the witness one more question:

Q. While Mr. Gordon is reading that letter may I ask you to look at these papers and see whether these are the papers referred to in your letter? A. Well, I did not read my letter through as you wanted it back.

Q. Very well, just wait till they finish with it and I
295 will hand it back to you. (After the letter had been examined by counsel:) Now you may look at the letter. A. Yes, I remember that letter. And I should think that this is the correspondence referred to. But I have no recollection of this letter to Mr. Henny or of the reply to Mr. Henny by Mr. Macgregor. But I remember this letter from the official assignee of the 30th of April, 1915, and I remember this letter of the 25th of March, 1915.

Q. Let us separate those that you do remember from those that you do not remember. Now, first, do you remember this one I now hand you? A. I remember having seen a letter similar to this, but whether it was this or not I can not be sure.

Q. Which of the others are there that you do not recall? A. I believe that a letter in terms similar to this was written to Mr. Henny.

Q. All right. We will keep those two. So the only one that you do not recall is that of the 18th of March, 1915? A. Yes.

Q. We will put that one aside for the present.

Mr. Kresel: I wish to offer the letter with enclosures that the witness has identified. There is one that he can not identify, so I do not offer it. May they be marked as one exhibit and may they be marked "Exhibit Behn, Meyer & Company, Limited, No. 34."

Let the record show that this exhibit consists of a letter signed by Sisson & Delay, for Mr. Macgregor, dated 28th of June, 1915; a letter from Mr. Macgregor to the Attorney General of the Straits Settlements dated the 25th of March, 1915; a letter from the official assignee in bankruptcy to
Mr. Macgregor dated April 30, 1915; and a letter
296 from Mr. Macgregor to C. G. J. B. Henny, dated 26th of March, 1915.

Mr. Kresel, continuing:

Q. Before I read these, Mr. Mundell, I should like to see if I can not refresh your recollection sufficiently to have

you identify this one letter which you have not as yet identified. I call attention to the fact that in your letter you say this: "Mr. Cateaux left with us on Saturday last the correspondence relating to the above matter and we return it herewith together with the documents he brought with him." And you mention Dr. Henny in here. That letter that you have not identified is from Dr. Henny, do you observe that? A. Yes.

Q. Does that refresh your recollection sufficiently to say that that was before you when you wrote this letter? A. Well, now——

Q. (Interposing.) Won't you just look at it again? A. I have little doubt that this is a copy of a letter from Mr. Henny, but I am sorry to relate that I can not remember whether it is an actual copy of the paper that was before me. I should think that Mr. Macgregor would have given me the original letter from Mr. Henny.

Mr. Kresel: I should like to ask the gentlemen on the other side, do you object to me introducing it with the evidence that Mr. Mundell has given? He says he does not doubt that it is a copy but that he does not remember having seen this particular paper.

Q. That is your testimony, is it not? A. I should think that that is the letter. I probably saw the original, but I should think that maybe that is a copy of the letter, but I do not remember.

297 Mr. Gordon: Do you know about it yourself, Mr. Kresel?

Mr. Kresel: Oh, yes.

Mr. Gordon: If you say there is no question but that it is a copy then all right.

Mr. Kresel: That is the fact. Then I offer it to be made a part of our Exhibit No. 34, it being a copy of a letter from Mr. Henny to Mr. Macgregor dated the 18th day of March, 1915. That completes the correspondence so it will be intelligible.

(Whereupon the said letter of June 28, 1915, from Sisson & Delay to W. H. Macgregor, together with the four other letters which have been identified and which are attached,

was marked by the Reporter, "Exhibit Behn, Meyer & Company, Limited, No. 34.")

Mr. Kresel: Now, with your Honor's permission I should like to read these. The first letter is the one I have last referred to, of 18th of March, 1915:

"From Dr. C. G. J. B. Henny,
"Batavia, 18th March, 1915.

"W. H. Macgregor, Esq.,
Liquidator Behn, Meyer & Co. Ltd.,
Singapore.

"DEAR SIR:

"My clients 'The London and Hanseatic Bank Limited' whose Registered Office is situated at 38 Lombard Street in the City of London cabled me that they are Trustees of £15,000—7½% debenture Stock of Langkaporea (Sumatra) Rubber Estate Ltd. an English Company; secured by the Trust deed between that Company and the London and Hanseatic Bank Ltd. dated 28th November 1912
298 whilst the security consists mainly of 63,500 shares of the 'Plantagen Gesellschaft Langkapoera' a Company resident at Batavia further I am informed that Behn, Meyer & Co. Batavia held these shares together with title-deeds and mortgaged deed as agents, of the London and Hanseatic Bank (Trustees) according their (i. e. B. M.'s) certificate of the 26th November 1914. Furthermore I am informed that B. M. & Co. Ltd. refuse to comply with the repeated request of the Trustees to deliver the shares and deed to the Hongkong & Shanghai Banking Corporation here. In consequence of this refusal I have been requested to obtain an order of the Court for the delivery of the shares and deeds.

"I have been informed by the British Consul General here that according to the Alien Enemies Ordinance 1914 Behn, Meyer & Co. is being wound up and I know that you have been appointed Liquidator. It is in consequence of this that I in name of the London and Hanseatic Bank Ltd. call in your aid, kindly requesting you if possible to order the Manager of B. M. & Co. Ltd. in Batavia to deliver the

above mentioned shares and deeds either to the Hongkong & Shanghai Bank or to me."

Q. Is Batavia in Java or in Sumatra? A. Batavia is in Java.

"I must add that it is supposed that the refusal of B. M. & Co. to deliver the shares and deeds is probably based on the fact that they are too willing to be watchful of the interests of German debenture holders, whose interests however, as I am informed, are safeguarded in London. Whether this supposition is right and whether B. M. & Co. will succeed in doing this I can not tell. B. M. & Co. 299 have however arbitrarily, i. e. without order from the Trustees, in December, 1914, cancelled the mortgage on the Estate Langkapoera in South-Sumatra, which was also given as security for the debenture holders and of which B. M. & Co. held the mortgage deed as Agent of Trustee, the L. & H. Bank Ltd. Through cancelling this mortgage and their refusing to deliver the shares and deeds to the Hongkong Bank appointed by the Trustees of debenture holders to receive the shares etc. B. M. & Co. cause the Trustees a loss, which at least will amount to £15,000—excluding interest.

"It is not improbable that the London & Hanseatic Bank as Trustees will tender a claim to you being appointed to wind up the affairs of the trade carried on by B. M. & Co. for indemnification for the loss which they suffer through the above mentioned doings of Messrs. B. M. & Co. Ltd."

He had the language right, didn't he?

"Should B. M. & Co. here persist in refusing to deliver the shares and deed I shall, according to my instructions be compelled to take legal proceedings against Messrs. B. M. & Co. and thus force them to deliver the shares or alternatively to pay an indemnification and as the Company is being wound up I am sorry to have to be compelled according to the here prevailing law to summon you as the Liquidators. Should I be compelled to take legal measures, and should you consider the claim of the London and Hanseatic Bank just, I hope that you, should you possess the power, will aid me in bringing the matter to

a quick final close and therefore not protest and be
300 willing to give a special instruction to act accord-
ingly, to the Solicitor who has to act for Messrs.
Behn, Meyer & Co. Ltd. in liquidation.

“I am, dear sir,

Yours faithfully,

“C. G. J. B. HENNY.”

The Court: That is addressed to whom?

Mr. Kresel: That is addressed to Macgregor, the liqui-
dator of Behn, Meyer & Company in Singapore. The an-
swer to that letter by the liquidator is as follows, this being
from Mr. Macgregor to Dr. Henny:

“28th March, 1915.

“G. J. B. Henny, Esq.,
Batavia.

“DEAR SIR:

“I am in receipt of your letter of 18th instant with ref-
erence to your claim on behalf of the London and Han-
seatic Bank Limited.

“I would point out that I am not liquidator of the whole
of the business of Messrs. Behn Meyer & Co. Ltd. but of
the business of the Company in the Straits Settlements.

“I have no control over the Branches situated in Nether-
lands India and I cannot force them to deliver the Docu-
ments requested by you.

“I have approached the Straits Settlements Government
on the subject and on receipt of the reply to my letter I
will communicate further with you.

“Yours faithfully,

(Sd.)

“BEHN, MEYER & CO., LTD.

“W. H. MACGREGOR,

“*Liquidator.*”

301 Then I read a letter from the official assignee in
bankruptcy in Singapore to Behn, Meyer & Com-
pany, Mr. Macgregor, Liquidator, dated April 30, 1915:

“Office of the Official Assignee in Bankruptcy.

“Singapore, 30th April, 1915.

“Re Behn, Meyer & Co., Ltd.

“SIR:

“I have the honour to reply to your letter of the 28th with its enclosure.”

Unfortunately I have not a copy of the letter of the 28th.

“As to the Chartered Bank claim, I shall be obliged if you will let me have a list of the claims made in respect of each of its branches and inform me whether the claim is merely for overdrafts on current account or is in respect of Bills of Exchange and other matters, I should also like to know, whether any of the branches held security.”

That is in reference to another matter.

“As to the London & Hanseatic Bank claim, it seems clear that they cannot get judgment against you: for one thing you never had the documents. I recommend that you cable home somewhat as follows:”

Q. May I interrupt the reading of the letter long enough to ask whether “home” referred to here means London?

A. Let me see that just a moment.

Q. Here it is. A. That is as to the London & Hanseatic Bank and Mr. Macgregor’s attorney in London.

Mr. Kresel: Now this is what the official assignee suggests to Mr. Macgregor that he should cable:

302 “Refer Ordinance 29 of 1914, recently amended.

Never had shares or title-deeds. Am only liquidating business of Behn Meyer & Co., Ltd. carried on Colony, not agencies nor Java business. Behn Meyer Maatschapij started without my knowledge and does not recognize me. Advise action in Java, Singapore office knows nothing about Langkaporea.’

“I may say that I have spoken to the Attorney General on both matters.

“I return the London and Hanseatic Bank Correspondence.

“I would invite your attention to section 4 (l) (2) (n) of the Ordinance as amended, and suggest that you should take legal difficulties, in the first place at least, to your solicitors.

“I have the honour to be, Sir,

“Your obedient servant,

(Signed)

“C. J. SAUNDERS,

“*Registrar of Companies.*”

“W. H. Macgregor, Esq.

Messrs. Behn, Meyer & Co., Ltd.”

Now, apparently he did take his difficulties to you. I shall read the letter written by——

Witness: Did you put that as a question to me?

Mr. Kresel: No. I withdraw that statement. I shall now read the letter of Sisson & Delay, dictated by Mr. Mundell. This is addressed to Mr. Macgregor of the 28th of June, 1915:

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“H.D.M./C.A.

“Sisson & Delay, Advocates, Solicitors, & Notaries Public.

“Clement Everitt, Howell D. Mundell.

“Telegrams: Delay, Singapore.

“Codes Used: A.B.C. 5th Edition, Bentley’s Complete Phrase Code. Broomhall’s Rubber Edition.

“Singapore, 28th June, 1915.

“DEAR SIR:

“The London & Hanseatic Bank’s Claim, Batavia Branch.

“Mr. Cateux left with us on Saturday ——.”

Q. Who was Mr. Cateux? A. At that time he was assisting Mr. Macgregor in the liquidation. He had been in the Philippines.

“Mr. Cateux left with us on Saturday last the correspondence relating to the above matter, and we return it

herewith together with the documents he brought with him, including the letter from the Colonial Secretary and the papers from the Dutch Court.”

Q. You do not happen to have those papers? A. No; I think we gave them all back to Mr. Macgregor.

Mr. Kresel: I continue reading:

“We are of opinion that your letter to Dr. Henny of the 26th of March last says all that there is to be said.”

Now, may I trouble your Honor again especially to read two paragraphs from that letter:

304 “I would point out that I am not liquidator of the whole business of Messrs. Behn, Meyer & Company, Limited, but of the business of the company in the Straits Settlements. I have no control over the branches situated in Netherlands India, and I cannot force them to deliver the documents requested by you.”

Now, that is the letter as to which it says here:

“We are of opinion that your letter to Dr. Henny of the 26th of March last says all that there is to be said. In that letter, however, you mention that you have written to the Straits Government on the matter, and that when you hear from them you will write Dr. Henny again.”

Mr. Gordon: Does it say that Mr. Mundell says that?

The Witness: It says we are of opinion.

Mr. Kresel: Sisson & Delay say that, but it was written by Mr. Mundell.

Mr. Gordon: But Sisson & Delay are saying that.

Mr. Kresel: I am sure that his Honor fully understands it.

“Under these circumstances, we think you might write him and say that you are advised that what you stated in your letter of the 26th of March is perfectly correct. You have no control over the Batavia Branch, and that you do not see how you can interfere in the matter at all.

“With reference to his request that you should instruct an Advocate in Batavia, we think you might repeat that you know nothing of the matters in issue, except what Dr. Henny and the Hanseatic Bank in London have told you—

that you are not in a position to obtain any information about the matter or to instruct Counsel, and it might perhaps be as well to write the London & Hanseatic Bank with a copy of your letter to Dr. Henny.

“When writing the Hanseatic Bank, we think you should draw special attention to the fact that you are not Liquidator of Behn, Meyer & Co., Ltd., that you have no right to possession of the title deeds and shares certificates mentioned in their letter of the 26th of March, and that you have no power to insist on their requests being complied with.

“We are, dear Sir,

Yours faithfully,

(Signed)

SISSON & DELAY.

W. H. Macgregor, Esq.”

There is one other letter here which I ought to read or it may be said that I purposely did not read it. And so I shall read the letter from Mr. Macgregor to the Honorable The Attorney General of the Straits Settlements dated March 25, 1915.

Mr. Gordon: Is that one of the letters introduced in evidence?

Mr. Kresel: Yes.

Copy.

“Behn, Meyer & Company, Limited (in Liquidation—
Singapore and Penang.)

WHM/CL. Telegrams: BEHN.

Singapore, 25th March, 1915.

The Hon. the Attorney General, S. S.,
Present.

306 “SIR:

“I have the honour to ask you to be good enough to give me your opinion on the following matter:

“I am frequently receiving claims from Creditors of this Company for amounts due to them by Branches of this Company situated in Neutral Countries. Among them I have received a claim from the London & Hanseatic Bank for the shares and Title deeds relating to a Rubber Company. These Documents are in the hands of Messrs. Behn,

Meyer & Co., Ltd., Batavia, who refuse to part with them to the authorized representatives of the Bank, and I have replied in these cases stating that as I am Liquidator of the Singapore and Penang Branches only I cannot recognize claims in respect of amounts due by the other Branches of the Company.

“In the case of the claim of the London & Hanseatic Bank, unless I deliver the Documents as requested, an action for recovery is threatened, and in view of the opinion expressed by the Official Assignee that Government is unable to prevent action being taken against the Liquidator in the Courts I should be obliged if you would inform me what steps I am to take to deal with the position. The claim in question is a very heavy one.

I have the honour to be, Sir,

Your obedient servant.”

Mr. Kresel, continuing:

Q. May I inquire whether you dictated the last letter I have read? A. No; I had nothing to do with that letter.

307 At the opening of the proceedings on February 3, 1927, the following occurred:

Mr. Gordon: Yes. May it please the Court, we have revised the order that we handed up yesterday morning in line with the suggestions made in court, and if there should be such an order we would prefer to have it in this present form. (Handing same to the Court.) I think that takes out the argumentative matter and makes it shorter and more to the point.

The Court: Has Mr. Kresel seen this? Well, I do not know that you need bother about this now. You may look at it and say whatever you choose about it, and then I will consider it.

The proposed order submitted by Mr. Gordon was as follows:

Upon motion by the plaintiff, it is by the Court, this — day of February, 1927,

Ordered, That leave be, and the same is hereby given the plaintiff to file within five days a supplemental bill of complaint in terms as in the present amended bill of complaint with an additional paragraph 14½ as follows:

“14½. The Articles of Association of Behn, Meyer & Company, Ltd., provide, and since the organization of said corporation have provided, in Section 89 thereof:

‘A resolution in writing signed by members entitled at a poll to three-fifths of the votes shall be as valid and effectual as a resolution of a general meeting.’

308 “By resolution dated November 18, 1926, in writing signed personally by Robert Glyn Evans, who was then entitled at a poll to more than three-fifths of the votes of Behn, Meyer & Company, Ltd., and again by resolution dated January 31, 1927, in writing signed by Robert Glyn Evans, who was then entitled at a poll to more than three-fifths of the votes of Behn, Meyer & Company, Ltd., by his duly constituted attorneys, Howell Dawson Mundell and James Arthur Clarke, it was resolved that the said suit, Equity No. 45881, be, and the same thereby was, adopted, ratified and confirmed by and on behalf of Behn, Meyer & Company, Ltd.”

It is further ordered that the answer of the defendants to the present amended bill of complaint may stand as the answer to the supplemental bill of complaint and that it may be considered that the defendants move to dismiss the supplemental bill of complaint, decision upon said motion being reserved until the final determination of the cause, and that the defendants deny the allegations of the new paragraph 14½ without filing answer thereto.

309 On further cross-examination by Mr. Kresel Mr. Mundell testified as follows:

“Speaking from recollection I do not think the liquidators were aware of the bringing of the pending suit in which Mr. Kresel represents the plaintiff soon after it was instituted in 1922. I do not think they knew of it until 1924, late in 1924. I think we first knew of it after—I think it was—it may have been pending the appeal to the Supreme Court of the United States, or it may have been after that appeal was decided. I am not sure. I think it was late in 1924, but you must remember this, that I had practically nothing to do with this matter until last year. I did come into it occasionally. I might have

discussed the point with Mr. Dickinson, my partner. I am one of the lawyers for the liquidators. I do not think that I am the attorney in fact of the liquidators. My impression is that the liquidators simply joined in that power of attorney for the purpose of testifying their consent to its execution. Without reading the power of attorney I think I am not the attorney in fact of the liquidators. That is the power of attorney that I drew myself. I am the liquidators' lawyer. I claim to be a director of the company. I am the attorney in fact of the custodian who claims to be a stockholder of the company. I have the right under that power of attorney to appoint other directors of the company, and in addition to all that my position is that I am a disinterested expert on the law."

It was stipulated that under the laws of the Straits Settlements the war between England and Germany came to an end on January 10, 1920.

310 Upon cross-examination by Mr. Stanley Mr. Mundell testified as follows:

"Having in mind Section- 107 and 117 of the Articles of Association of Behn, Meyer & Company (Behn, Meyer plaintiffs' Exhibit 11) relating to the consulting committee under the laws of the Straits Settlements with respect to the organization of corporations, there is no specific provision for a consulting committee of this sort. I think under the law of the Straits Settlements these provisions would not make the corporation the agent of the consulting committee. It is not my opinion that under the laws of the Straits Settlements provisions as to the consulting committee are ineffective. This is simply similar to a contract between members of a company and the company, that is, between the members they shall be bound by these provisions. Under these provisions a board of persons residing in Europe which are not the board of directors but an independent body has the power and the right to control the action of the directors generally. I do not think it is quite as far as to say that under Section 117 the board of directors must implicitly obey everything that the consulting committee says that it shall obey. It says with regard to the management of the business or any matter

connected therewith or incidental thereto and not inconsistent or contrary to the ordinance.

311 "It is my opinion that under the laws of the Straits Settlements the action of December 1921 in Hamburg, Germany, by the Board of Directors, or the alleged Board of Directors and the alleged stockholders and the alleged consulting committee was a violation of the provisions of the Treaty of Versailles as those provisions were incorporated in the laws of the Straits Settlements."

312 Upon further cross-examination by Mr. Kresel, Mr. Mundell testified as follows:

Q. Now, one other question: You said in answer to Mr. Stanley's question that in your opinion subjects of Germany, while in Germany, during the war and after the war, had no power to take any act with reference to any property of a company like Behn, Meyer & Company, Limited, a liquidator to wind up its affairs of the trade in the Colony having been appointed. Now, have I correctly stated your testimony? A. I thought Mr. Stanley's question dealt with the exercise of powers which would affect the right of the British Government in connection with property subject to the peace treaty.

Q. Therefore it follows, does it not, that by your answer to that question you did not mean to say that in your opinion the stockholders of Behn, Meyer & Company, Limited, though living in Germany, could not in 1921 take any action with reference to the money in the Treasury of the United States which was the proceeds of the liquidation of the Philippine branches, did you? A. I do not think they could.

Q. That is what I thought. A. I say, I do not think the stockholders could, Mr. Kresel.

Q. Well, I misunderstood your answer. I thought you had agreed with me. A. No; I did not.

Q. You do really mean and you do now say that in your opinion the stockholders could not pass any action with reference to the disposition of the money in the Treasury of the United States which was the proceeds of the sale of the Philippine branches. A. That is my view, yes.

Q. And that because in your opinion the British
313 Government had a charge on that property. A. I
expressed my opinion on yesterday, Mr. Kresel,
that——

Q. (Interposing.) Well, never mind, we are dealing with
today. A. I said I thought the British Government had,
through the charge on the shares, a right to the property.

Q. Which means that your claim is that the British Gov-
ernment has a charge on this money. A. Indirectly, yes.

Mr. Kresel: Well, we will take it indirectly, then. That
is all I wish to ask.

314 On redirect examination Mr. Mundell stated that
having read part of the record he wished to make
certain corrections and testified as follows:

“I am reported to have said, We act for the liquidators.
We act for Behn, Meyer & Company, Ltd.” As a matter
of fact we never have and never did act for Behn, Meyer
& Company, Ltd., except in isolated cases before the war,
and apart from acting for the liquidators we have never
acted for the company. Then on page 680 I said, “I had
nothing to do with it”—that is, this suit—“until October of
last year.” Now that perhaps is not absolutely accurate,
because Mr. Dickinson may have discussed points with me
from time to time, and I may have occasionally had some-
thing to do with the case. But it was not a matter that I per-
sonally attended to until October of last year. The on page
758 I said that in practice an English barrister who has not
practiced in the Straits Settlements had never been ap-
pointed a judge of the colony. Now that is not correct either.
I know of several appointments where the person appointed
was a barrister who had not practiced in the colony prior
to his appointment. Then on page 763 I have said that
the common law of England is the common law of the
Straits Settlements “as modified by the charters of the
Straits Settlements, and by—well, principally as modified
by the charter.” Now that is not accurate. The common
law of England is the Common law of the Straits Settle-
ments as modified by the laws of the Straits Settlements,
which include various Indian acts, and also certain Imperial
acts which apply to the colony and in addition to the
charter.”

315 Upon re-direct examination Mr. Mundell testified:

Q. Mr. Mundell, you have just stated in answer to the last series of questions that it is your opinion that under the Treaty of Versailles the British Government has an indirect charge upon these assets in the United States? A. Yes.

Q. Now, you have never been offered a satisfactory opportunity to explain in detail how you arrive at that conclusion. I now ask that you will kindly do so. A. My view is this. That the shares of Behn, Meyer & Company, Limited, being only transferable on the books of the company and not in any way transferable by delivery, constituted property within the Straits Settlements, the dominions of His Majesty, and were therefore subject to the charge created by the peace treaty and the clearing office ordinance of the Straits Settlements. That inasmuch as the British Government were entitled to these shares they were also entitled to the property which these shares represent, and if there is a claim in respect of the shares, as I think there is, to these assets of the company in the Straits Settlements, the British Government as being entitled to these shares is entitled to the assets referred to.

316 Mr. Mundell continued his testimony as follows:

"I have no doubt that the custodian of enemy property has the right and power to act as a shareholder in corporations generally and in particular in Behn, Meyer & Company through an attorney or attorneys in fact. I referred to a case previously, the case of Pharaon et Fils, reported in 1918, 1 Chancery, I think, in which the English court held that the Controller appointed under the 1916 act had all the powers of a shareholder. I did not act as attorney for the custodian in connection with the power of attorney. After the vesting orders had been given the Attorney General of the Straits Settlements agreed to the custodian giving a power of attorney to the witnesses who were coming to America in connection with this suit. He asked me to draw the power of attorney, and he perused it on behalf of the custodian, and only after he had perused and approved it on behalf of the custodian was the custodian allowed to sign. My firm was representing the

liquidators throughout. It makes no difference whatever to me whether the suit is lost or won, because under the English law and under the law of the colony no lawyer can make an arrangement for a higher fee in the event of success than he would get in the event of loss, and we do not make such arrangements. My fee has been arranged with the Straits Settlements Government, at least with the liquidators with the approval of the Straits Settlements Government. The suit of Behn, Meyer & Company brought by the liquidators was brought before I became actively associated with the case. I was in the colony when the suit was originally instituted, but Mr. Dickinson was attending to the matter."

317 Q. Mr. Mundell, there were some questions asked on cross examination with respect to what you knew or know concerning the certificates of shares in Behn, Meyer & Company belonging to the German shareholders having been in the Straits Settlements some time since the war, and having been turned over to the German shareholders. Have you any knowledge on that subject whatever? A. I have no personal knowledge of those share certificates that were produced in court at all. I have seen some share certificates. As far as I recollect they were only the share certificates of a man called Engler, and that was in connection with an application by Engler's representative for the return of the shares in a case brought before the Anglo-German Mixed Arbitral Tribunal.

Q. My point is that if you do know anything about the situation as to the possession of these shares in the colony at that time, or their having been delivered, tell us about it. A. No. Before I left the Straits Settlements to come here I asked that search be made to find out if the share certificates and share register were still in the possession of the liquidator. Or whether they ever had been. I thought that the share register ought to have been because under the law, the Companies Act, the share register is to be kept at the registered office of the company, and I thought the liquidator ought to have it, and we ought to have had copies of it for production here. I then learned that certain documents—what they were I do not know—had been handed over to Mr. Overbeck, and I cannot say what those

documents were, and I cannot say whether these share certificates which have been produced in court were ever in the colony or not.

318 “Decisions which have held that property, rights and interests of Germans located in England on January 10, 1920, became subject to the charge created by the Treaty as to which property no steps had been taken under the war legislation of England prior to January 10, 1920, include *Baeltz v. Public Trustee* which I referred to, the *Fazbender* case, 1922, 2 Chancery 850, and the *Baeltz* case in 1926 Chancery. The *Fazbender* case was the case of a woman who married a German national before the Treaty of Peace came into force, and she was held nevertheless to be a German national, and therefore her property was subject to the charge. It had not been vested prior to January 10, 1920.

319 Q. Now, Mr. Mundell last but not least, yesterday just before Mr. Kresel accomplished his coup de grace with your letter, so-called opinion, you were about to make an explanation——

Mr. Kresel: Don't call it a so-called opinion.

Mr. Doing: I think you will find it was not, Mr. Kresel, in a moment.

By Mr. Doing:

Q. You were about to make an explanation with reference to having consulted the Governor about something, and that that might have some bearing upon what would seem to be an expression of opinion. Now will you kindly clear us up on the question as to whether or not you personally held the opinion at the time this letter was written either in conformity or not in conformity with what seems to be the opinion expressed in the letter? A. As soon as the ordinance was passed and I amongst others was consulted about it, I noticed that the Liquidator had to act in conformity with instructions issued by the Governor. I saw the Attorney General personally, I saw Mr. Saunders, who wrote the letter which Mr. Kresel put to me yesterday, and I ascertained from both of them——

Mr. Kresel: Now just a moment. I must object, your Honor, to any hearsay conversations between the witness

and somebody else in the Straits Settlements. We cannot be bound by that.

By the Witness:

A. I obtained from them directions which I was instructed to convey to the Liquidator as to the manner in which he should act. That letter was written, having regard solely to those instructions, and not to my opinion. The Attorney General always held the opinion that——

320 Mr. Kresel: I object to the witness stating what he understands the Attorney General had an opinion of.

Mr. Doing: If your Honor please, he was confronted in a most dramatic fashion yesterday with a letter which was supposed to have expressed his opinion as of that time. He is now, we submit, entitled to show that the letter did not contain his opinion, but contained instructions which he gave based not upon his opinion, but upon instructions which he had received. That is all he is doing.

The Court: Up to that point no objection was made. Now Mr. Mundell is about to say what opinion the attorney general of the Straits Settlements has always entertained.

The Witness: It has been sufficiently pointed out perhaps in the Attorney General's opinion.

The Court: I think the testimony as to that would be purely hearsay.

Mr. Doing, continuing:

Q. Have you anything more to say about that that you consider relevant? A. No; I say that that letter was written having regard solely to the instructions which I obtained from either Mr. Saunders or the attorney general. It was not a question of my own opinion at all as to what Mr. Macgregor was to do. We invariably in case of doubt went to see either the attorney general or Mr. Saunders to ascertain what attitude they wished the liquidators to adopt. In other words, in event of any question of doubt we went to the Government.

321 Q. There is one question asked in Mr. Stanley's cross-examination on yesterday, as to whether the Straits Settlements law, and I mean the Alien Enemies (Winding-up) Ordinance, did not go back of the corporate

entity. I think your answer was yes. Now I should like if you would to have you say just what you meant by going back of the corporate entity in that case.

The Witness: I do not remember using the expression going back, but Mr. Stanley used some expression which I did not quite understand. I think it was a question about disregarding the corporate entity.

Mr. Stanley: I think that is what I said.

A. You said, disregarding the corporate entity. I intended to say, but I do not remember the question now, that as far as the Straits Settlements law disregards a corporation it is only when it is necessary to do so and the affairs of the winding up are such that you come down to a consideration of the question who are the persons interested in the assets. In so far as it is necessary for
322 the purpose of winding up to consider the rights of individual shareholders, the law does go behind the corporate entity. And so it would in a winding up under any other law.

Q. And that your answer did not go beyond that contention you have just expressed? A. No.

On recross-examination by Mr. Kresel the following occurred:

By Mr. Kresel:

Q. Mr. Mundell, you testified on yesterday as follows, and I am reading from page 810 of the record:

“Q. Well, you mean to say, Mr. Mundell, that you do not know that the custodian of enemy property of the Straits Settlements returned those certificates and the books that I have mentioned.”

Meaning thereby the stock certificate books and stock register.

“to the German stockholders? A. My recollection is this, that those books and those certificates were handed over by the liquidator.

“Q. To whom? A. To Mr. Overbeck, I think.

“Q. Representing the German stockholders? A. Representing Behn Meyer.

“Q. The German stockholders? A. Yes; the German stockholders.”

Was that testimony true? A. Well, in a way it was, but I was not speaking from personal knowledge. As I have stated subsequently I really knew nothing about it, I had no personal knowledge about it.

323 Q. I am going to ask that question over again.

Was it true, as you there testified, that it was your recollection that these books and these certificates were handed over by the liquidator to Mr. Overbeck? A. It was my recollection of what I had heard. It was not a personal recollection at all. I have no knowledge of those certificates at all.

Q. Is it not a fact that your firm acted for the liquidator in that very matter of handing over those books and certificates? A. I do not know.

Q. Did not you so testify on yesterday?

A. I know that——

Q. (Interposing.) Let me read you from your testimony.

Mr. Gordon: Begin at the beginning of his testimony.

Mr. Kresel: Just one moment.

Mr. Kresel, continuing:

Q. I read from page 812:

“Q. Well, your firm was acting for the liquidators? A. Yes, my firm was acting for them.

“Q. In this very matter? A. Yes.”

Was that true or was that also some information or recollection? A. In connection with the Behn Meyer matter certainly.

Q. No, this very matter, of handing over the stock certificates, did not you testify that your firm handed them over to the liquidators? A. May I see it?

Q. Certainly. I want you to look at it.

Mr. Gordon: If the Court please, I ask that Mr. Kresel be required to show Mr. Mundell all his testimony and not a part of it.

324 Mr. Kresel: Mr. Gordon, you know better than to interfere at this time. I have a perfect right to call this witness' attention to testimony that he gave, and to ask him whether he wants to say now that that was not true.

Mr. Gordon: Your last question was, did not you testify——

The Court (Interposing): Wait a minute.

Mr. Kresel: And he is now reading his testimony.

The Court: Anybody can call attention to a part of the testimony, or may read a part of a letter, subject to the right of the other side to call attention to what it conceives to be the rest of it. Mr. Gordon, you will not be precluded from asking any other question. In fact, Mr. Mundell now has before him all of his testimony of yesterday.

Mr. Kresel, continuing:

Q. You may answer. A. When I said my recollection is this, that these books and these certificates were handed over by the liquidator, I say again that that is not a statement of my personal recollection except in so far as it relates to my recollection of what I was informed on it.

Q. I have passed that. My last question to you was whether you did not testify that your firm acted for the liquidators in this very matter of handing over these certificates. Look at page 812 of the record and you will find that there. A. Yes.

Q. Is that true? A. I believe my firm had something to do with this, but I do not know what——

325 Q. (Interposing.) Was that testimony true that I read to you, namely, that your firm acted for the liquidators on that very matter? A. So far as I know that is true, although I have no personal knowledge of what actually happened.

Q. All right. Now I understand you to say that notwithstanding the testimony that I read to you and that you gave, that you would thereby say that you were informed that that is what the liquidators had done. Do I state your present testimony correctly? A. Well, if I said that those books and those certificates, thereby meaning——

Q. (Interposing.) “If” you said? Do not let us deal in ifs. Did not you say that?

Mr. Gordon: Does not the record speak for itself?

Mr. Kresel: Yes, it certainly does.

Mr. Kresel, continuing:

Q. You did say it? A. I referred to specified books and specified certificates. In so far as I did so I was making a misstatement.

Q. Well now, the misstatement that I understand you made was to this effect: That whereas you stated that that was your recollection, what you meant thereby was that you were so informed, is that it? A. Not only that, but I had no personal knowledge of this to the best of my recollection, and I did not know and I do not know now what books or certificates the custodian or the liquidators had. All I know is that I did see, I think, a certificate or certificates in the name of Enger.

Q. Mr. Mundell, I am sorry to be pressing you on this, but still you have not answered my question: Do you now mean to say that when you testified that to your recollection these certificates and these books were handed over by the liquidator to Mr. Overbeck, you meant thereby that that is what you were informed? A. No. It is difficult to explain——

Q. (Interposing.) What did you mean thereby? A. Well, I did not realize——

Q. (Interposing.) I did not ask you what you realized, but what you meant by it. A. I should like to explain it in my own way. I did not realize that your question referred to all these share certificates which have been put in evidence and the share register books. And that is why I said what I did. I had in mind, or at least I had been informed that certain books and certain documents which I believed were share certificates were handed over to Mr. Overbeck.

Q. You were informed that those were handed over by the liquidators? A. Yes.

Q. And the information came to you from the liquidators? A. I think from one of the liquidators, yes.

Q. Who was your client? A. I think Mr. Whitaker said that he handed them certain papers.

Q. Certain certificates and books? A. I am not quite sure, but I think it was either Mr. Whitaker or Mr. Clarke. Some one did inform me that certain books and certain certificates were handed over to Mr. Overbeck.

327 At the conclusion of the case of the plaintiff in Equity 45881 the following occurred:

Mr. Kresel: Do you gentleman rest?

Mr. Gordon: As far as I know we do. There is the question of the order that was presented this morning, as to the supplemental pleadings.

The Court: I should rather listen to testimony about facts and opinions than to express any opinion about anything. That we will just pass and it will be kept open, at the same time anybody against whom the decision goes will taken an exception. If we have time to do it I will take it up this evening.

328 On behalf of the plaintiff in Equity 40361 Mr. Kresel introduced in evidence as Exhibit Behn, Meyer & Company, Ltd., No. 35, an original notice of claim filed pursuant to Section 9 of the Trading with the Enemy Act. No question having been raised as to the sufficiency of this notice, it is not made part of the record on appeal.

329 **Christopher Nixon**, being recalled as a witness on behalf of the plaintiff, Behn, Meyer & Company, Ltd., in Equity No. 40361, testified as follows:

"I have studied the minutes of the meetings of the stockholders, the directors and the Consulting Committee of Behn, Meyer & Company held on the 13th of December, 1921. In my opinion, under the laws of the Straits Settlements and under the Articles of Association of that company those were valid meetings of the several parties that I have named, and the acts at those meetings were legal, binding and proper. I have also studied the resolution signed by Messrs. Laspe and Witthoefft, together owning more than three-fifths of the shares of the stock, which resolution has been put in evidence. The legal effect of that three-fifths resolution was to ratify the appointment of the directors at the meeting of December 13, 1921. The ratifications of the stockholders, the ratifications of the directors who were such before the War, and the ratifications of the directors who were elected at the December 13, 1921 meeting would have the effect, under the laws of the Straits Settlements, of barring the persons making them

from making any complaint as to the validity of the actions which they have ratified. I have studied the minutes of the meeting of the shareholders held on January 3, 1927. That ratifies the actions taken December 13, 1921.

“I have heard the testimony of Mr. Mundell with reference to certain irregularities that he pointed out as to the meetings of the stockholders and directors held on December 13, 1921. Those were that the meetings were held outside of the Colony, that the chairman of the directors did not preside at the meeting of the stockholders, that
330 the directors had not fixed the place of meeting, and that some of the directors had not theretofore been qualified by a shareholding. Despite those irregularities the acts at those meetings of the shareholders and directors on December 13, 1921, under the laws of the Straits Settlements and the Articles of Association of Behn, Meyer & Company, Limited, were legal and valid. In support of the opinion that I have just expressed, I desire to introduce in evidence certain decisions of the English Courts, *MacDougall v. Gardner*, 1875, 1 Chancery Division, page 13; *Marshall's Valve Gear Company, Limited, v. Manning, Wardle & Company*, 1909, 1 Chancery, 267; *Wayne v. Egnep, Limited*, 1921, South African Law Reports, Witwatersrand, Local Division, page 91; *Barron v. Potter*, 1914, 1 Chancery Division, 895.

“Assuming that the meetings of the stockholders and directors held in Hamburg December 13, 1921, were irregularly called, in my opinion the Consulting Committee under the Articles of Association had full authority to do the things which are mentioned in these minutes and the Consulting Committee's ratification removed the effect, if any, of the irregularities.”

Q. Mr. Mundell testified that in his opinion the acts at the meetings of the shareholders and directors held on December 13, 1921, were invalid for the reason that the action there taken, namely the appointment of Mr. Martens as attorney in fact, and the resolution to institute this action which we are now trying, were invalid because contrary to the provisions of Article 297 of the Treaty of Versailles prohibiting German owners from disposing of property subject to the charge. Now in your opinion does that sec-

tion of the Treaty and the charge therein referred
331 to apply to the property which was the subject of
that resolution, namely, the moneys in the Treasury
of the United States which were the proceeds of the sale
and liquidation of the Philippine branches of Behn, Meyer
& Company, Limited? A. No, sir.

Q. If anybody had any charge under the Treaty on that
property what nation was it? A. The United States.

In my opinion under the laws of the Straits Settlement
the stockholders, directors and consulting committee had
the power to and did at their meetings on December 13,
1921, severally and properly exercise the right and power
to appoint Emil Martens the attorney in fact of Behn,
Meyer & Co. Ltd., and they severally then had the power
to and did at said meetings of December 13, 1921, validly
exercise the power to vote for a resolution authorizing the
institution of this action.

In my opinion under the laws of the Straits Settlements
this action was properly instituted in the name of and on
behalf of Behn, Meyer & Company, Limited, by Emil Mar-
tens, the attorney in fact under the resolution of December
13, 1921. In my opinion under the laws of the Straits Set-
tlements the appointment of the liquidators by the Gov-
ernor of the Straits Settlements did not entitle those liqui-
dators to maintain an action in this court for the recovery
of the proceeds of the sale of the property of Behn, Meyer
& Company, Limited, in the Philippine Islands. In my
opinion no one other than Behn, Meyer & Company, Lim-
ited, represented by Emil Martens as its attorney in fact
has the right to maintain an action in this court for the
recovery of the proceeds of the sale of the property of

Behn, Meyer & Company, Limited, in the Philippine
332 Islands. Assuming that the powers of the former
directors of Behn, Meyer & Company were revived
when peace was declared January 10, 1920, these powers
did not continue beyond the 13th of December, 1921 when
directors were elected. On the question of the effect of
the outbreak of war upon the powers of German directors
in an English Company, I wish to offer in evidence *Damler
Company v. Continental Tyre Company*, 1916, 2 Appeal
Cases, 307. Assuming that the directors of Behn, Meyer

& Company, Limited, who were in office at the time the European War broke out, as a result of that war were in a condition that their powers were suspended and that then their powers were revived in January 1920, and they again became directors, in my opinion, under the laws of the Straits Settlements and in view of these meetings and the ratifications, those directors could not now object to the maintenance of this action according to the resolution instituted as it was by Mr. Martens as attorney in fact.

333 Christopher Nixon then continued:

“Under Article 104 of the Articles of Association of Behn, Meyer & Company, Ltd., (which the witness quoted) if the directors of 1914 assumed to resume their powers subsequent to the restoration of peace, and were to object to the action taken December 13, 1921, the doctrine of the Marshall’s Valve Gear Company case applies, where it is ruled that if under the organic act, the Articles of Association and the memorandum of a company, the appropriate organ of the company has power to make regulations binding upon the directors, and if further it appears to the Court from the facts before it that that organ would act and overrule the directors, it is not necessary to call any particular meeting. In that case the situation was this. There was a difference between one director who himself held more than the majority of the stock of the company and his fellow directors, four in number. The one director holding a majority of the common stock instituted a suit in the name of the Marshall’s Valve Gear Company. The other directors moved to strike the name of the company from the record of the court on the ground that the action had not been authorized by the directors. The court said a single shareholder can start an action and then the court will take means to find out. But if it appears beyond any doubt what the action of the general meeting will be the court is not going through the mere formality. And in that case it was provided that the directors should be subject to regulations made in general meeting. And the learned judge knowing that the stockholder, Mr. Marshall, had control of that meeting said it is all right, and denied
334 the motion. Even though the directors opposed. And I may add this, that it clearly appears in the case

of Behn, Meyer & Company, Ltd., that the stockholders whom Mr. Kresel represents have got power to pass any extraordinary resolution they like, because they themselves own more than 29,000 out of 30,000 shares in this company, and an extraordinary resolution is one merely calling for a three-quarters majority.

“The rule of the English court is that no country will enforce the penal or confiscatory legislation of another country. In support of this I desire to offer in evidence the *Russian Commercial Company v. Comptoir*, 1925 Appeals Cases 112; in *re Fried Krupp*, 1917, 2 Chancery, 188; *Le Couturier v. Rey*, 1910 Appeal Cases, 262; and I think the *Employers liability v. Rossia* is already in evidence. There it was a clear principle of English law. There are innumerable cases on it. The English courts have ruled that war legislation is regarded as penal and confiscatory legislation, in *re Hagelberg*, 1916, 2 Chancery 503; *Law Times*, Volume 115, page 444, the date being November 18, 1916; also the *Fried Krupp* case, *Law Times*, Volume 117, beginning at page 21. The *Fried Krupp* case is a decision of Mr. Justice Younger, who later became Lord Justice Younger, and the *Hagelberg* case is also a decision of Mr. Justice Younger. Of course opinions of Lord Justice Younger are greater authority in the British Courts than that some court of appeal out in Shanghai.

“So far as the appointment of the liquidator is concerned, the rights of the owners the members of the company outside the Straits Settlements were unaffected, except in so far as their power to act in connection with a company an enemy of Great Britain during the war, being suspended.

“I have seen the vesting orders put in evidence in the case. In my opinion under the laws of the Straits Settlements and the Treaty of Peace these vesting orders have no effect at all. To begin with these vesting orders, which as I recollect are orders made by the Governor of the Straits

Settlements in council, purporting to vest those
335 shares owned by Mr. Laspe and Mr. Witthoefft and Mr. Lorenz-Meyer, in Behn, Meyer & Company, Limited, purporting to vest those in the custodian of enemy property in the Straits Settlements, that has no effect one way or the other on the powers or the assets controlled out-

side of those in the Straits Settlements which belonged to the liquidators. Secondly, these vesting orders, as I understand them purported to be made under the clearing office ordinance, and under paragraph 17 of Section 1 of the order in council which was made a part of the ordinance. Now, subparagraph (*d*) of that paragraph 17 is a power given under the order in council to the board of trade but the Straits Settlements legislation in applying this treaty of peace and order in council to the Straits Settlements, by reason of the authority given to the Straits Settlements legislature by the Imperial Order in Council, substituted the words "Governor in council" and that makes it read "the Governor in council may by order vest in the custodian any property, rights and interests subject to the charge." And that is the essential language, so that he cannot deal with anything which is not subject to the charge provided for by the Treaty of Versailles. Now one must turn in order to find out what is subject to the charge, to the Treaty of Versailles, Section 4 of part 1, which is sometimes referred to as the economic clauses.

"Now that Part IV consists of Articles 297, 298 and an annex.

"Now in Article 297 of the Treaty of Versailles, paragraph (*b*) it is provided that:

"Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights, and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, * * *

"Now that means that the property, rights and interests to which this paragraph referred must be within the territory of the colonies or the possessions or protectorates of the particular Allied and Associated Power in question. And I lay particular stress upon the way in which the whole of the domains of each power are described.

"Then when I turn to paragraph 4 of the Annex, which defines what the Allied and Associated Powers had the right to do with regard to property, rights and interests of German nationals, it says:

“All property, rights, and interests of German nationals within the territory of any Allied or Associated Power
* * *

“Now putting these two provisions together, and finding that in paragraph (b) of Article 297 the language is “territories, colonies, possessions and protectorates” and finding that in paragraph 4 of the Annex the word used is simply “territory”, and knowing that these two phrases are in the same section 4 of the Treaty dealing with property, rights and interests, in my opinion the Treaty did not intend to give under this paragraph 4 of the Annex to Part IV the right to charge the property of German nationals located in colonies—I do not need to deal with the others, because “Colony” is the thing in point here—
337 and therefore there was no right given by the Treaty of Versailles to charge property located in the Straits Settlements.

“Now secondly, there is a second objection with regard to any possible effect which this vesting order might have with regard to the Philippine property. The scheme of this section 4 of Part X of the Treaty is quite clearly that each of the Allied and Associated Powers would be given power with regard to the property of German nationals located within its political boundaries, and the primary consideration is the physical location of the property. The United States was a party to the negotiation and drafting and signing of this Treaty of Versailles. It is true that in subsection (b) there is added phraseology with regard to companies controlled by German nationals.

“In my opinion, considering the circumstances under which this language was drafted and settled, it was not the intention of the framers of the Treaty and of the Powers which signed it that by any possible use of interests and companies controlled by Germans there should be an interference by one Allied and Associated Power with property physically located in the territory of another.

“Making the matter more specific, my point is this, that under the language of the Treaty of Versailles which is set forth in these laws, here was property in the Philippines within the United States territory. That property under the Treaty was a matter for the United States and nobody else. And here we have the situation that the Supreme

338 Court of our country has decided that the property out of which this litigation arises was not subject to seizure by our own Alien Property Custodian. And I say it is absurd to suggest, they having made that decision, that the United States will allow another nation, another power, to come, if you please, within the territory of the United States and exercise its war powers when the United States had declined to exercise any such power. And I say further that the Legislative Council of the Straits Settlements must be deemed to have known those limitations and never have intended by any of its legislation to reach Philippine property.

“There is another ground on which I conclude that these vesting orders are of no effect. That is on account of the treaty which has recently been made between Germany and Great Britain.

“The Treaty was signed between Germany and Great Britain December 2nd, 1924. Ratifications were exchanged September the 8th, 1925. And the Treaty was registered with the League of Nations under the Covenant of the League of Nations on January the 6th, 1926.

“Now this Treaty is a Treaty by which Britain and Germany by and large may be said to promise to each other most-favored nation treatment. There is a provision, Article 31 in that Treaty, by which it is provided that the Treaty is not to apply to various portions of the British Empire unless notice be given by the British Representative at Berlin notifying the German Government that it is desired to apply the provisions of this Treaty to the particular territory in question. Such notices have been given with regard to many portions of the British Empire, including the Straits Settlements. And therefore the Treaty is binding upon the Straits Settlements and its governing authorities.

339 “Now there is this to be said. That Treaty gives most-favored nation treatment. When the Treaty is found I want to read one or two of the provisions. It is absolutely inconsistent with the notion that there should have survived that treaty this power arbitrarily to seize property belonging to German nationals in the Straits Settlements territory. It is said in a portion of the protocol to the Treaty that it is to be interpreted in the widest possible way.

“Now there is this observation I wish to make with regard to this Treaty. At the time of the signature there was a reference by one of the German plenipotentiaries who were negotiating the Treaty to a certain letter referring to the operation of the Reparations Recovery Act of Britain. The Germans had been suggesting some change in the procedure in the way in which Britain was getting some reparations, and there is a letter referred to which deals with suggested changes. In reply to that observation Sir Austen Chamberlain, the British Foreign Secretary, said, ‘Yes,’ and he continued to make some remarks with regard to the Treaty being made without reservation, and to its not affecting rights enjoyed under the Treaty of Versailles.

“Now on that I would say, first, it is quite a question whether any such colloquy between plenipotentiaries at the time of the signing of a Treaty becomes in any way a part of the Treaty or binding upon the nations whom those plenipotentiaries represent. Such a question has arisen with regard to the Treaty of Dorpat between Finland and Russia, and was regarded as so serious that the Council
340 of the League of Nations asked the Permanent Court of International Justice for an advisory opinion on it. They did not get it because the Permanent Court considered that it was essential for the consideration of that question that Russia should appear and argue, and Russia declined.

“There is this further observation to be made, however, that the Treaty was registered with the League of Nations. But as I understand it, it was registered by Britain alone. Germany at the time of registration had not yet been admitted to the League. I believe I cannot be quite certain about this, because it is difficult to get definite information, but I believe the Treaty was registered by Great Britain alone, and therefore Germany took no part in determining what to register. But at any rate, taking all these circumstances, I am of opinion that it ended the right of the Governor in Council of the Straits Settlements to make any vesting orders with regard to German property, if he had that right, which I am of the opinion he had not.”

By Mr. Kresel:

Q. We will get that Treaty in a moment. You have read the so-called power of attorney that has been put in here?

A. Yes.

Q. And have you read the resolution of January 31, 1927, signed by Mr. Mundell and Mr. Clarke? A. That was the one made here in Washington?

Q. Yes. You have? A. Yes.

Q. What, in your opinion, under the laws of the Straits Settlements is the effect in this suit of those two instruments? A. Who was it that signed that power of attorney?

Q. The power of attorney was signed by the liquidator and by the custodian and by—

341 “The power of attorney (Liquidators’ Exhibit —) was signed by the custodian and by the company by the liquidator. The liquidator had no power to act for the company so he cannot bind the company. The custodian has no rights in the shares so he cannot do anything with regard to the company. In my opinion the whole instrument is—well nonsense, if you like.

“The liquidators of Behn, Meyer & Company, Limited, appointed under the Winding-Up Ordinance of the Straits Settlements are not entitled to the proceeds of the sale of the property of Behn, Meyer & Company, Limited, in the Philippine Islands, which proceeds are now in the Treasury of the United States. Under the laws of the Straits Settlements the liquidators of the affairs of the trade in the Straits Settlements of Behn, Meyer & Company, Limited, have not the right or the power to go outside of the Straits Settlements and come into the courts of the United States and maintain an action in those courts to recover the proceeds of the sale of the property of Behn, Meyer & Company, Limited, in the Philippine Islands which is now in the Treasury of the United States. They are only liquidators of trade in the Straits Settlements pursuant to power given by a legislature which had no power outside of the Straits Settlements.

“I am going to read one section of the Treaty between Germany and England of which I spoke a few moments ago, but my observations regarding this Treaty go to the whole policy and effect of the Treaty.

Article V of the Treaty

The subjects or citizens of each of the two contracting parties in the territories of the other shall be at
342 full liberty to acquire and possess every description of property, movable or immovable which the laws of the other contracting party permit or shall permit the subjects or citizens of any other foreign country to acquire and possess. They may dispose of the same by sale, exchange, gift, marriage, testament or in any other manner, or acquire the same by inheritance under the same conditions as are or shall be established with regard to the subjects or citizens of the other contracting party.

“Now in the Protocol which was signed at the same time as this Treaty it is provided:

“The Treaty of Commerce and Navigation signed this day, being based on the principle of the most-favored nation, both parties to the treaty undertake to give the widest possible interpretation to that principle. In particular, while retaining the right to take appropriate measures to preserve their own industries they undertake to abstain from using their respective customs, tariffs or any other
charges as a means of discrimination against the
343 trade of the other, and to give sympathetic consideration to any case which may be brought to their notice in which, whether as the result of the raising of customs duties or charges themselves or of arbitrary or unreasonable customs classification any such discrimination can be shown to have arisen.”

“The latter portion I am not particularly interested in in this connection. The language I want to lay stress on is that ‘both parties to the treaty undertake to give the widest possible interpretation to that principle’—the principle being that of the most-favored nation.

“And going back to Article V, I want to emphasize the full liberty both to acquire and to possess.

“Now it is quite certain that the Straits Settlements do not exercise the right of seizing arbitrarily the property of nations that were never in the war, or nationals of such nations located in the Straits Settlements. These Straits

Settlements respect property rights of alien friends. The Germans are alien friends today. This is putting the Germans on the same basis as other alien friends. It is putting an end to the treatment arising out of the war. Taking the Treaty of Versailles and these powers to seize, if they exist in the Straits Settlements, when are they to come to an end? What kind of an instrument has to bring them to an end if this instrument does not?

“My opinion is that this treaty made in December, 1924, between Germany and England, binding in the Straits Settlements by virtue of notice given, finished the power, if the power ever existed, of the Straits Settlements seizing property under war legislation.”

344 On cross-examination by Mr. Stanley Mr. Nixon testified as follows:

“In my opinion under the laws of the Straits Settlements shares of stock in a corporation, I do not mean the certificates, but the interest of the shareholders in a corporation are situated at the situs in the territory of the jurisdiction from which the corporation takes its existence. The jurisdiction incorporating, that is the general rule. I mean to say there are all kinds of modifications of that rule with regard to different kinds of certificates, and one thing or another, for different purposes. But for the purposes of this Treaty and legislation I think it is probable that such shares would be regarded in the ordinary way as situated in the territory or jurisdiction where the company is incorporated. I mean to say there are cases about that which make other provisions under some circumstances. Therefore the property right of the German stockholders in Behn, Meyer & Company, Ltd., in the stock which they own was located in the Straits Settlements is so far as it depends upon the incorporation of the company. I do not think that the stock of the Germans in Behn, Meyer & Company, Ltd., was subjected to this charge by the Treaty of Peace under paragraph (xvi) because certain provisions of the treaty including those provisions to which I referred and from which I quoted also became part of the law of the Straits Settlements and there is an inconsistency between the general language from which Mr. Stanley quoted and the language which I quoted, and weighing the whole matter

together and the circumstances under which this language came into existence, I say that the interpretation I have given is the correct one. There was no intention

345 on the part of the legislature of the Straits Settlements—or if there was an intention there was no power—but there was no intention to do anything that was not authorized under the language of the treaty considered by itself. In spite of the language of section (*xvi*) of paragraph 1 of the Treaty of Peace Order the stock of the Germans in the Straits Settlements was not subjected to any charge by the Treaty. There is nothing in subsection (*b*) of Article 297 that specifically limits the provisions of subsection (*xvi*). Annex to Part IV, paragraph 4, “All property, rights, and interests of German nationals within the territory of any Allied or Associated Power” is sufficient for my purposes. That language constitutes a definition of the extent of the capacity to charge. It goes on after the words “within the territory”—“of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power.” Now then I wish to determine just what property, rights and interests of German nationals are meant there, and I take the word “territory” in that text, “territory” used alone without the addition of the words “colonies, possessions and protectorates,” and I reason that as when the makers of the treaty wished to cover “colony” in addition to something they designate as “territory” they say so, and that therefore the word “territory” in this paragraph 4 cannot be deemed to include in its meaning that of a colony. The language which I am using is also a part of the law of the colony. This is made the law of the colony. It is all part of the law and there are
inconsistencies. I have studied this and reached an
346 interpretation, and in my opinion—I may be wrong—I do not say the question is free from difficulty, but in my opinion that word “territory” in that context does not cover a colony.

“Referring to paragraph 16 of the Treaty of Peace Order of 1919 which says: ‘All property rights and interests within His Majesty’s dominions or protectorates belonging to German nationals at the date the treaty comes into force shall be charged with certain charges,’ there is of

course a difference of language here which is susceptible of different constructions. I take it that under paragraph 16 of Section 1 of the order in council of the 18th of August, 1919, that the words 'His Majesty's dominions or protectorates' mean probably the whole of the territories in the world, with the exception of the mandated territories that are subject to the British Crown. Of course the term 'dominion' is a term that is ambiguous. It has technical meanings that would not justify the wide extension which I have just mentioned. But I think probably 'dominions' and 'protectorates' there include all the British Crown lands anywhere in the world over which it has, in one form or another, political authority, with the exception of the territories which Great Britain or one of its dominions govern under mandates granted by reason of the peace treaty and administered under the supervision of the League of Nations. That language is not the same, it is different, I mean different from the language in Article 297 of the Treaty, paragraph b, which is, 'territories, colonies, possessions, and protectorates.'

"Now, in my judgment all that the British Legislature can do, or could do, was to give effect to the right that Great Britain obtained by the treaty. It made the language of the treaty the law of the British Empire, subject to this provision, that there was a saying that these things should apply to colonies and so forth, and providing for
347 modifications necessary by circumstances of the colony.

"I have come to the conclusion from such study as I have been able to give it that the interpretation I have given is the best interpretation I can give where there are conflicting provisions. I may be wrong but that is my opinion.

"This Treaty or Peace Order forms a separate document of which this so-called economic provision of the treaty is simply a schedule, but they are made as sections of the treaty. It is stated in this order that they shall have full force of law. The Treaty of Peace Order became the law of Great Britain. I think the order probably became the law in the Straits Settlements in a general way apart from the authority of the legislative council of the Straits Settlements, but that body has the power to make suitable

modifications. I mean to say that there is no board of trade in the Straits Settlements so that it provided some other plan. Later the Straits Settlements order did become the law.

“My view is, as I have already stated, that the British authorities cannot by anything they have reserved with regard to stock of a company controlled by Germans, get any authority within the boundaries of United States territory.

“The German Republic is bound by the provisions of the Treaty of Versailles and in so far as the German law and the English law are concerned I think it does make the bulk of the Treaty provisions their law, with regard to German citizens, yes, but there may be a gap there. Assuming that the Treaty of Versailles does apply in Germany and assuming that it created a charge upon the stock of Behn, Meyer & Company which was owned by these Germans, because it was in British territory, it is my opinion that the Germans could secure assets of the corporation which were present in territory other than British territory and take those assets to Germany and thus reduce the value of the stock and at the same time not violate the provisions of the Treaty of Versailles.”

Mr. Kresel introduced in evidence as Exhibit Behn, Meyer & Company, Ltd., No. 37, the Treaty of Commerce and Navigation between the United Kingdom and Germany, dated December 2, 1924, the material parts of which are as follows:

349 *Treaty of Commerce and Navigation Between the United Kingdom and Germany and Additional Protocol Signed at London December 2, 1924, with Other Relevant Documents.*

Ratifications Exchanged at London September 8, 1925.

Article 1. There shall be between the territories of the two contracting parties reciprocal freedom of commerce and navigation * * *.

Article 2. The subjects or citizens of each of the two contracting parties in the territories of the other shall enjoy in respect of their persons, their property, rights and interests,

and in respect of their commerce, industry, business, profession, occupation or any other matter, in every way the same treatment and legal protection as the subjects or citizens of that party or of the most favored foreign country in so far as taxes, rights, customs, imposts, fees which are substantially taxes, and other similar charges are concerned.

* * * * *

Article 5. The subjects or citizens of each of the two contracting parties in the territories of the other shall be at full liberty to acquire and possess every description of property, moveable and immoveable, which the laws of the other contracting party permit or shall permit the subjects or citizens of any other foreign country to acquire or possess. They may dispose of the same by sale, exchange, gift, marriage, testament or in any other manner, or acquire the same by inheritance under the same conditions as are or may be established with regard to subjects or citizens of the other contracting party.

* * * * *

Article 31. The stipulations of the present treaty shall not be applicable to India or to any of his Britannic Majesty's self-governing dominions, colonies, possessions or protectorates unless notice is given by his Britannic Majesty's representative at Berlin of the desire of his Britannic Majesty that the stipulations shall apply to any such territory.

351

Protocol.

(1) The Treaty of Commerce and Navigation signed this day being based on the principle of the most favored nation, both parties to the Treaty undertake to give the widest possible interpretation to that principle. In particular while retaining their right to take appropriate measures to preserve their own industries, they undertake to abstain from using their respective customs tariffs or any other charges as a means of discrimination against the trade of the other, and to give sympathetic consideration

to any cases that may be brought to their notice in which, whether as a result of the rates of customs duties or charges themselves or of arbitrary or unreasonable customs classification, any such discrimination can be shown to have arisen.

* * * * *

(4) His Britannic Majesty's government undertake:

a. To recommend to Parliament the necessary legislation for the removal of the disabilities imposed by the legislation specified below affecting German citizens and German companies in the United Kingdom which do not extend to the subjects or citizens or companies of the most favored foreign country, viz:

Non-Ferrous Metal Industries, 1918.

Aliens Restriction (Amendments) 1919, Sec. 12.

Trading with the Enemy (Amendment) Act, 1918,
(Sec. 2).

* * * * *

(8) It is agreed that the Treaty signed this day shall come into force only after the necessary legislation
352 or administrative measures have been passed by the appropriate authorities in the respective countries.

“Done at London in duplicate in English and German texts, the 2nd December, 1924.

“AUSTEN CHAMBERLAIN.

“D'ABERNON.

“STHAMER.

“C. V. SCHUBERT.”

No. 3.

Minutes of a Meeting Between British and German Representatives, Held at 4 p. m. on the 2nd December, 1924, at the Foreign Office, London, for the Purpose of Signing a Treaty of Commerce and Navigation Between Great Britain and Germany.

Plenipotentiaries present:

Great Britain: The Right Honourable Austen Chamberlain, M. P., His Majesty's Principal Secretary of State for

Foreign Affairs; the Right Honourable Lord D'Abernon, G. C. M. G., His Majesty's Ambassador Extraordinary and Plenipotentiary at Berlin.

Germany: His Excellency the German Ambassador, Dr. Sthamer; Dr. Carl von Schubert, Director in the German Ministry for Foreign Affairs.

The Secretary of State for Foreign Affairs announced that the negotiation of the Treaty of Commerce and Navigation between Great Britain and Germany was now concluded and that the treaty was ready for signature.

353 The German Ambassador, on behalf of the German delegation, drew attention to the terms of Sir
354 Otto Niemeyer's letter to Herr von Schubert of the 28th November, 1924, and desired that a copy thereof should form an annex to the minutes of this meeting.

The Secretary of State for Foreign Affairs agreed, and stated that the Treaty was signed on either side without reservation and upon the understanding that it would not prejudice in any way rights enjoyed under or in virtue of the Treaty of Versailles.

The German Ambassador concurred in the view.

The plenipotentiaries (the Secretary of State for Foreign Affairs and Lord D'Abernon for Great Britain, and the German Ambassador and Herr von Schubert for Germany) then proceeded to the signature of the Treaty and of the protocol attached thereto, and the proceedings terminated.

AUSTEN CHAMBERLAIN.

D'ABERNON.

STHAMER.

C. V. SCHUBERT.

No. 4.

Annex.

Sir Otto Niemeyer to Herr von Schubert.

November 28, 1924.

DEAR HERR VON SCHUBERT:

I have now been able to consult the Chancellor of the Exchequer, and am in a position to give to you our reply

with regard to the Reparation Recovery Act. In the first place, I can repeat my assurance that we have no desire to retain the Act for its own sake, and that the only object of any stipulations which we may make is to secure that by departing from the procedure under the Act, as
355 it at present exists, the British Government does not lose the share of reparation receipts to which it is entitled.

The difficulty which we see in adopting any procedure on the lines of that suggested in the memorandum which you gave to me yesterday, is that the Reparation Recovery Act has a recognized position, and that we must make sure that if we alter the procedure we do not sacrifice the rights which we enjoy in respect of the Act as it stands, in which form the German Government agreed to facilitate its working by reimbursing the amount of the levy to German exporters by article IX of the Schedule of Payments and by their acceptance of the Dawes plan. We hold, as I told you, that it was the intention of the Dawes Report that the annuities for the first two years should be received in the form of deliveries in kind and local expenditure of the armies of occupation. The Dawes Report explicitly states that where there is reference to deliveries in kind in the report: "We have intended to include therein payments in Germany arising through the operation of the Reparation Recovery Acts." Before, therefore, we could consider any alternative procedure, it would be necessary to ascertain whether the agent-general, the Transfer Committee and the other Governments which signed the London agreements take the view that the annuities for the first two years must be received in deliveries in kind (including payments under the Reparation Recovery Act), and, if so, whether they would take the view that payments under the system which you propose could, for this purpose, be considered as being payments under the Reparation Recovery Act. As I explained
356 to you, the scheme which you propose would necessarily entail the repeal or suspension of the Reparation Recovery Act, and there is, therefore, clearly great doubt how far payments received under an alternative plan would be accepted by all the parties concerned as being subject to the same conditions as payments under the Act as it now exists.

Moreover, under existing inter-Allied agreements our receipts under the Recovery Act are exempt from the charge for Belgian priority and for the United States of America arrears of cost of occupation, and if our position is to be the same under the alternative procedure as under the existing procedure, it would clearly be necessary to obtain an extension of these privileges to our receipts under the new procedure.

It appears to the Chancellor of the Exchequer that the first step must necessarily be to ascertain what view of the matter would be taken by the agent-general, the Transfer Committee and other parties concerned. It rests with the German Government to ascertain whether it will be possible to get the consent of the agent-general and the Transfer Committee to a proposal on the lines put forward or on similar lines which would protect the British rights referred to above, and, at the same time, not involve payments by individual merchants. The British Government cannot give any formal assurance, but they are quite ready to use their good offices to secure such a result.

As soon as the necessary consents have been obtained, the British Government will enter into negotiations with the German Government with a view to the introduction of the new procedure.

I am, &c.,

O. E. NIEMEYER.

358 On cross-examination by Mr. Doing Mr. Nixon testified as follows:

“It is my opinion that because Section 4 of the Annex to Article 298 provides that property rights and interest of German nationals within the territory of any of the allied or associated powers may be charged, there is no right to charge properties in the Straits Settlements. In my opinion the Straits Settlements is not a part of the territory of the British Empire within the meaning of “territory” as used in that paragraph. It does not include the dominion of Canada. The dominion of Canada is a party to the treaty. It signed the treaty as represented by its own delegates in the League of Nations. I note that it says “territory of allied or associated powers.” I think the intent of the

language was possibly to give Canada under that provision the right mentioned, but of course I have not devoted the same attention to Canada, because Canada was not before me. At the beginning of the treaty there is a description saying "the British Empire." The treaty immediately goes on to deal with this matter and says "the allied and associated powers being equally desirous that the war, and so forth should be replaced by peace, and for this purpose the high contracting parties, represented as follows": "The President of the United States and so on, his Majesty, the King of the United Kingdom by certain plenipotentiaries" and then for the dominion of Canada, for the Commonwealth of Australia, and so on. Now, offhand—and mark you, these matters of construing conflicting language are things that require opportunity to study the specific point raised, as I have studied some of the specific points raised in this litigation—but offhand I am inclined to think that the question you

put to me in regard to Canada is answered by
359 saying that within the meaning of this paragraph 4 of the annex, following 298, for the purpose of that paragraph Canada might be considered to come within the allied and associated powers, particularly in view of her position in the conference and in the League of Nations and the growing constitutional importance of these dominions in the British Empire.

Q. Is it not true that in order to arrive at that conclusion you have to extend the definition of allied and associated powers as specifically laid down in the very beginning of the treaty. A. I have, as we are doing in everything in issue in this case, we have got to consider it.

Q. So that in order to prevent their being a charge in the Straits Settlements you have to limit the word "territory" so that it cannot include the Straits Settlements, and you have to enlarge the term "allied and associated powers" within the treaty in order to include Canada. A. No, that is a non sequitur.

Q. I think I have made the only point I wanted to make, that Canada is not described as an allied and associated power. But you think it is included? A. Yes.

Q. If I am correct in assuming that the allied and associated powers are described in the treaty as the British

Empire, the United States and others, and does not mention any of the British dominions or colonies or protectorates, then in subdivision 4 of this annex the words "allied and associated powers" must also exclude all of the British dominions, protectorates, colonies and so forth, must it not? A. No, there is a further construction in language that is stronger for the points you are raising, territories, colonies, possessions, protectorates, in (b) 360 of Article 297. The question is to ascertain what is the meaning in paragraph 4 of the annex of the word "territory." It is very possible that the term "colony" for example in (b) does not cover Canada, Australia and those portions of the British Empire which are generally known now as dominions, with a special status. And it may be, although I have considered only one specific point, that there is other language to throw light on these things. A colony may be a Crown colony or a colony with some representational interests but not representative Government. It is not usual now in talking about the British Empire to refer to the dominions by the term "colony."

Q. But the sum and substance of it is that in your opinion the territory of the British Empire, which is one of the allied and associated powers named in the treaty, does not include the colony of the Straits Settlements within Section 4. A. I have stated that you have to consider this word for the purpose of that paragraph, but not for other paragraphs, which may have no relation to it.

"The treaty of 1924 between Great Britain and Germany refers to the future rights of Germans including the right to possess their property that they possessed at the moment of the treaty being signed. It said they shall have the right to acquire and possess. That does not mean that they are only to possess what they acquire in the future, as you will see if you will refer to the provisions with regard to the nationals of the most favored nation. It means that they have got the right to possess what they have and acquire new property and possess that too."

361 Q. Well, aren't you of the opinion, or do you hold the opinion, as to the effect of the operation of the charge created by the Treaty of Versailles upon German

property, that that charge was placed thereon on a specific date, namely, January 10, 1920? A. Power was given on a certain date and power was given to impose charges, and then the power was clamped down on particular property in certain ways. Now, the power to clamp down the charge finished with the Treaty of Commerce and Navigation. It is impossible to conceive that a nation which has agreed to give the nationals of another nation most favored nation treatment, reserves the right arbitrarily to seize the property of such persons within its territory.

Q. Do you consider that any particular action was necessary by the allied governments after they had created this charge upon German property in order to take the benefits of the charge? A. The language is fairly clear that certain property, rights and interests of German nationals in a certain locality may be charged. And then when the British Empire goes to take advantage of that it provides means. I do not know that those are the only means it could have used, but it did provide means.

Q. Assuming, absurd as it may seem to you, that the custodian really did vest these shares and became the owner of more than three-fifths of the stock. If we get by that point, is the resolution that purported to have been passed pursuant to Article 89, which we read in evidence, otherwise valid? A. Well, I do not undertake to pass upon

all that language of your power of attorney because
362 it is interminable, but if you ask me this, that if the custodian having rightfully become entitled to the shares on that assumption, having properly complied with this Article 89 by making a resolution in writing, and having more than three-fifths, that if he does that, and he is entitled to the shares, I suppose he gets the benefit of this article like any other stockholder would, but I am not going to take that document which runs on and on and on and purports to do all kinds of things. But if the custodian makes himself rightfully the shareholder there is a provision as to members of his company, and if they can do such and such a thing by a resolution in writing by three-fifths vote it is going to be effective for the purposes described here.

Mr. Kresel then handed to the stenographer certain cases which were to be considered as part of Mr. Nixon's testimony as follows:

Swifte v. Attorney General (1910) 2 Irish Rep. 140
and (1912) A. C. 276.

Trial of Earl Russell (1901) A. C. 446.

Commissioner of Stamps (Queensland) v. Wienhold
(1915) Commonwealth Law Rep. 531.

Commercial Cable Co. v. Attorney General (1912)
A. C. 820.

In re Oriental Inland Steam Co. (1874) L. R. 9 Ch.
App. 557.

Craig S. S. Co. v. Chartered etc. Bank (1897) 1 Q.
B. (C. A.) 460.

New Zealand Loan & Mercantile Agency Co. v. Morri-
son, (1898) A. C. 349.

363 Certain cases were then put in evidence by Mr.
Gordon as follows:

Hilder v. Dexter L. R. 1902 A. C. 474 at p. 477.

Regina v. Hertford College, L. R. 3 Q. B. Div. 693
at p. 707.

Salkled v. Johnston, 2 Common Bench 757, 135 Eng-
lish Reports p. 1144.

Mr. Gordon: Can we refer to cases in our briefs which
are not in the testimony?

Mr. Kresel. There is no objection to referring to cases.
The distinction lies between considering a case as a part
of the evidence and using a case on your brief for your
argument. My understanding of the practice is that where
it is a question of foreign law the expert in testifying and
using cases as a basis must put them in as a part of his
testimony. That is the only reason I have done this. Of
course, any English case can be referred to upon the brief
and in argument.

Mr. Gordon: We have a few more cases that, in view of
what you said, we would like to put in. These cases support
our view of the Treaty of Versailles.

Mr. Kresel: I have no objection.

1. Fasbender v. Attorney General, 1922 (2 chan.)
850—C. A.

2. Reitzes de Marienwert v. Austrian Prop. Admin.
(1924) 2 Chan. 282.

- 364 3. Re Chamberlain's Settlement—(1921) 2 ch. 533.
 4. Rothschild v. Austrian Prop. Admin. (1923) 2 ch. 542.
 5. Hahn v. Public Trustee—(1925) 1 ch. 715.
 6. Hoeck v. Public Trustee—(1921) 2 ch. 67.
 7. The Marie Gartz—(1920) p. 172.
 8. Re Levinstein, (1921) 2 ch. 251.
 9. Favorke v. Steinkopf, (1922) 1 ch. 174.
 10. Re Newberg's Settlement, 1923—1 ch. 508.
 11. Re Biedermann, 1922—1 ch. 31.
 12. Kramer v. Attorney General, (1923) A. C. 528.
 13. Public Trustee v. Wolf—(1923) A. C. 544.
 14. N. Y. Life Ins. Co. v. Public Trustee—(1924) (2 ch. 101).
 15. Fried v. German Property Adm. (1925) Ch. 757.
 16. Re Hallenstein, (1922) 1 ch. 355.
 17. Randfontein case.
 18. Baeltz v. Public Trustee—1926 ch.

365 Thereupon the testimony in the above entitled cases was closed, subject to the right of Mr. Kresel to furnish thereafter the certificate of Sir T. Willes Chitty above mentioned, and the Court adjourned at 7.45 P. M. Thursday, February 3, 1927 and the argument was set for 10.00 A. M. Wednesday, February 23, 1927.

The cases came on for further hearing pursuant to the said adjournment at 10.00 o'clock A. M. on February 23, 1927, whereupon the following occurred.

366 Mr. Kresel: Now, your Honor, one other thing. Since we adjourned there has come into my possession a letter written by Mr. Bailey, who is one of the liquidators who is bringing this action, bearing upon the question that your Honor will recall I asked Mr. Mundell with reference to the return by the liquidators, with the consent of the Custodian, of the stock certificates, the register, and the certificate books, which as we contend, was in 1925, that these documents were handed over to the German stockholders. In my argument I shall take the opportunity to point out to your Honor the significance of that act on the part of those officials. There seems to be some question

in Mr. Mundell's testimony upon this point, which question I think can now be resolved if your Honor will permit me to introduce this letter in evidence. It is a letter dated the 7th of December, 1926, and came to me only, as I say, since we adjourned here the last time. It is written by Mr. Bailey, who, for all practical purposes, is a party here. He is one of the liquidators, and of course it is an admission on his part, which I wish to put in evidence.

Objection was made to the introduction of this letter by Mr. Stanley and by Mr. Gordon, and Mr. Kresel continued as follows:

Mr. Kresel: Your Honor, the purpose for which I offer that letter is this: We shall contend that under the Clearing House Ordinance, under which the liquidators claimed that the vesting order of the stock of these Germans had been made, there is provision for the return of property subject to a charge. Even if there was a charge the Government that is entitled to the charge may return the property. We contend that this property, after it became subject to the charge, and assuming that it was ever subject to the charge was returned by the Government to these stockholders. Now, that is my point.

367 Mr. Doing: If your Honor please, if that letter is intended as in any wise showing a possible release of those shares from the charge, we could not permit it to be offered without asking for an opportunity to know just exactly what happened. The letter proves absolutely nothing. But if your Honor were going to consider it at all, all sides would require an opportunity to know exactly what took place on the alleged return of these shares, and to show conclusively that it did not amount to a release of the shares from the charge or was not intended to do so.

* * * * *

Thereupon, counsel for the defendants and for the plaintiff in Equity 45881 renewed their objections to the admission of the letter, and after discussion the following occurred:

Mr. Kresel: Now, might I add one more thing: Of course, one of the liquidators was here. I asked Mr. Clarke—not when he was on the witness stand, to be sure,

but in the presence of his counsel, what he knew about the return of these papers, and he denied that he had any knowledge whatsoever. Of course, if Mr. Clarke were here, and I had that proof that I now have from that letter, that he personally sent a cable to Mr. Overbeck, when he was on the way over here to testify, asking a return of those papers, Mr. Clarke would have had to concede that he knew about it. But I have not Mr. Clarke here, and I say when I produce a letter written by one of the plaintiffs here, containing that admission, that I am entitled to it.

* * * * *

368 The Court: As I look at it now, this would only, if admitted, strengthen the testimony which is already in. I think upon the record as it now stands I am bound to find that those certificates and the register book were turned over by the custodian, or the liquidator rather, to the German stockholders. There is nothing to the contrary. To be sure it was hearsay testimony that was given, but there it stands, and I do not see how I could make a finding of fact except to the effect that I have just stated.

* * * Well, then, we might go ahead, and unless I am advised to the contrary by something that appears from the transcript, I can find that as a fact whatever the fact may be.

Mr. Gordon: That what?

The Court: That the liquidators have turned over to the German stockholders the certificates of stock and the stock register book.

* * * * *

Mr. Kresel: May that letter be marked, then, if your Honor please, and shall produce the original of that letter I have cabled for it. I feel it is important. And unless I produce the original it is understood that this copy is to be disregarded. Now, I cannot do any more than that.

* * * * *

The Court: Well, of course the objection that there is no proof that it is a copy I suppose is a good one. But I do not know that I need to rule upon that at this minute, as to its admissability or not. I will consider it, but it will

not affect my finding on the point one way or the
369 other because there is no evidence to the contrary of
the hearsay evidence that was given. If the fact is
one of any significance whatever I am bound to find it. I
think——

Mr. Kresel (interposing): Is it not the rule that where
an original document is out of the jurisdiction of the court
a copy may be introduced?

The Court: Oh, yes.

Mr. Kresel: And certainly if the original is not finally pro-
duced the stipulation is that the copy shall not be consid-
ered unless that original is produced.

The Court: If that were the only point in the matter I
would say in fairness the copy ought to be admitted sub-
ject to the production of the original. But Mr. Doing made
some point about it, that if produced at the time we were
hearing the case they might have had some opportunity to
examine it, and that is the only thing that gives me pause
about letting it in. But you may proceed with the argu-
ment on the assumption that I shall find and do practically
find as a fact that the liquidators did turn over this certifi-
cation and so on.

Mr. Kresel: With the consent of the custodian.

Mr. Stanley: Oh, no.

Mr. Doing: That is a point that was not testified about.

370 The Court: I cannot do that.

Mr. Doing: Mr. Mundell testified that originally
he did not know whether the custodian did or not, that he
believed there was something in the matter of the liquidators
having turned them over, but why or how it was done he
did not know.

Mr. Hershkopf: Your Honor understands that when we
asked Mr. Clarke, or when we considered the matter about
putting him on the stand, that he said he knew nothing.
That cut us off from the witness who has now left the
jurisdiction. If he had remained here we could subpoena
him and swear him and get out of his own mouth and of
his own knowledge a statement that that letter is true, that
these papers were turned over, and that he attempted to
get them back, and attempted to do these other things. But
the situation as it now is deprives us of an opportunity
to get that testimony. And it does not lie in the other

side to prevent it that they did not have an opportunity to get it out of their own witness.

Mr. Stanley: That is most extraordinary.

The Court: Of course the technical situation would be that the plaintiffs should move to reopen the case and produce the testimony. That would be the way to handle that technically. And if you wanted to do that I would not say that I should not be inclined to.

Mr. Gordon: Well, that statement of Mr. Hershkopf I do not think is fair to Mr. Clarke or our case. I read that letter hastily, but all it is saying is that Mr. Clarke is trying to get the certificates back. Of course everybody knows that they are trying to get the certificates. There is no doubt about that.

Mr. Stanley: I do not think that what Mr. Hershkopf and Mr. Kresel said to Mr. Clarke when he was not on the witness stand would affect the Government.

The Court: No, it does not influence me at this time.

Mr. Kresel: No.

371 The Court: Because technically the case is closed.

Mr. Kresel: The point that I want in this letter, your Honor, is this, where Mr. Bailey says that the cable intended to refer "to the documents delivered to you, to which action I find from the correspondence in our office the Custodian of Enemy Property in Singapore agreed to." Now can they stand here in the face of this letter, assuming that I have the original signed by their client—could they stand here and say to your Honor that this is not true?

Mr. Gordon: It is not necessary for us to say that Mr. Clarke may have known or may not have known.

Mr. Kresel: I am not saying Mr. Clarke.

Mr. Gordon: Well, I am concerned with what Mr. Hershkopf said about it.

Mr. Hershkopf: The cable was sent by Clarke.

The Court: Of course that brings in another thing, Mr. Kresel. This letter from Mr. Bailey says: Which arrangement he finds from correspondence in the office of the Custodian.

Mr. Gordon: Certainly.

The Court (continuing): —the Custodian agreed to. That immediately would require the correspondence, because Mr. Bailey might be mistaken as to whether the Custodian

agreed or did not agree, so you have got another style to get over on that proposition. Now all that I could say is that if you want to make a motion to re-open the case and take further testimony I will entertain it. But as it is I have to take the record as it stands.

Mr. Kresel: Your Honor, I would not ask your Honor to re-open the case for that purpose. I do not want to delay the disposition of the case. It would mean a delay of months.

The Court: Yes, I appreciate that.

Mr. Kresel: To send a deposition out to Singapore and have it returned.

372 The Court: But I think, Mr. Kresel, that I should now, as I look at it, have to exclude it on the ground that the paper itself refers to certain information which the writer thinks that he got from certain correspondence, and obviously the correspondence ought to be produced so we will know whether he is right in his conclusions.

Mr. Kresel: All right, your Honor.

The Court: So I will exclude that, and you take an exception if you please.

Mr. Kresel: May I have it marked for identification.

The Court: Yes.

(Letter of December 7, 1926, from C. V. Bailey to H. Overbeck, N. V. Behn Meyer Handles Maatschappij, Batavia, was marked by the Reporter "Behn Meyer & Company Exhibit for identification No. 1 of February 23, 1917.")

The Court: Now may I ask this. As Mr. Doing said a minute ago, the admission made by Mr. Mundell was to the effect in the beginning that he had heard that they had been returned. He first said they had been, and then he merely heard. Now what does he say as to who returned them, according to his information.

Mr. Kresel: Your Honor, may I direct your Honor's attention that on page 810 Mr. Mundell testified as follows—

Mr. Gordon: Let the Court read it. It is on two or three pages there, and it is all together. Page 810.

Mr. Kresel: Will your Honor begin at page 810.

Mr. Stanley: Volume 6.

Mr. Kresel: Right at the top of the page.

Mr. Gordon: There are two later references.

The Court: Well, the best that I could find from this would be that the liquidators turned over the certificates.

Mr. Gordon: Yes.

Mr. Kresel: Yes.

373 The Court: Whether or not it was with the consent of the Custodian does not appear.

Mr. Doing: Yes, your Honor.

The Court: Very well.

Mr. Doing: And the purpose of the turning over does not appear.

374 The case was then argued by counsel. Mr. Kresel on behalf of the plaintiff in Equity 40361 contended that a decree should be entered in plaintiff's favor as prayed in its bill.

Mr. Gordon on behalf of the plaintiff in Equity 45881 contended that a decree should be entered in his favor as prayed in his bill of complaint. He urged that the evidence showed that Behn, Meyer & Company was a corporation organized under the laws of the Straits Settlements, that it was not an enemy or ally of enemy within the Trading with the Enemy Acts, that under the laws of the Straits Settlements in like case reciprocal rights would be extended to citizens of the United States, that if Section 9 (e) of the Trading with the Enemy Act precluded recovery by Ben, Meyer & Company, such section would be unconstitutional as depriving them of property without due process of law. Mr. Gordon further contended that the liquidators appointed under the laws of the Straits Settlements had authority to maintain Equity 45881 in the courts of the District of Columbia.

Mr. Doing continuing the argument for the plaintiff in Equity 45881 contended that entirely aside from any right that the liquidators might have to bring this suit, the bringing of Equity 45881 had been ratified by the corporation, Behn, Meyer & Company. Mr. Doing contended that the plaintiff in Equity 45881 were entitled to prove this ratification in the suit although it had occurred after the institution of the suit. At this point the following occurred:

Mr. Doing: Now, if your Honor will remember, during the course of the discussion, when we offered this resolu-

tion, your Honor stated substantially that same thing; that in order to constitute adoption and ratification of the suit it was merely a matter of evidence, of proof, and
375 your Honor thought it should come into the case without the necessity for any amendment, and that if you thought an amendment were necessary you would allow the amendment to be made.

I should like to pass that question of amendment at this time with the understanding that your Honor will consider it on the basis of what you have said, and if you should consider an amendment necessary we have submitted a supplemental bill which your Honor will have for that purpose.

The Court: I do not think any supplemental bill is necessary for this thing that has happened since the filing of the bill, because you want it to go back as of the time when the bill was filed. It is not something that affects the rights of the parties without such relation. So no supplemental bill need be filed.

376 Mr. Doing then continued his argument on behalf of the plaintiff in Equity 45881. Mr. Doing contended that there had been a valid and effective corporate adoption and ratification of Equity 45881 by Behn, Meyer & Company, Ltd., that the custodian of enemy property of the Straits Settlements was a shareholder under the vesting orders and consequently the resolution adopting the suit was valid and effective to sustain the liquidators' suit, that the shares of Behn, Meyer & Company, Ltd., had their situs in the Straits Settlements, that the Straits Settlements Clearing Office Amendment Ordinance, 1921, rendered these shares subject to the charge whether the vesting was before or after the date of the Treaty of Versailles, that the Straits Settlements law was valid under the Treaty of Versailles, that it was not affected by the Treaty of Commerce and Navigation between England and Germany of December 2, 1924, that the vesting orders constituted a vesting under the charge, that there had been no release of the charge, and that the custodian held twenty-nine thirtieths of the shares of the corporation and had a right to speak for the corporation, that the taking of the shares

under the Treaty of Versailles was not penal legislation but was an act of eminent domain by Germany and that the American courts will give complete effect to the custodian's rights as a shareholder.

At the conclusion of Mr. Doing's argument Mr. Stanley commenced his argument for the defendants in both cases.

At this point the Court stated:

“I shall find that the liquidators were not universal liquidators. I will give my reasons for it later if I come to it. My notion about it is this: There is the statute, and it has certain words *if* it, and the words are to
377 be taken in their natural meaning, and each word has to be taken as having some significance in the statute. Now, ‘the affairs of the trade in the colony.’ is a phrase, and you cannot leave out the words ‘in the colony.’ If they wanted to have him a universal liquidator they would have said: ‘The affairs of the trade of the corporation, leaving out the words ‘in the colony.’ The only way you can get any other meaning is to dig through the statute and pick out something here, there and at other places, and argue as to what the powers of a liquidator are under the companies’ act, and all that kind of thing. But I do not find anything elsewhere in the statute that seems to me to give those words any meaning except the plain, ordinary meaning. Now, Mr. Gordon argued the other day about that clause, and I do not remember the number of it, which said that the liquidator had all the powers of a liquidator in a voluntary winding up, was not that it?

“Now, Mr. Gordon, not very strenuously I will say to his credit, argued that if it had been except in so far as the same are not consistent with the ordinance there might have been something else in the way of a meaning to be attached to it. But they just fitted in language that went before, and they said, except in so far as inconsistent. And that means the same thing whether you put the negative on consistent or somewhere else. And there are inconsistencies I judge. Assuming that the liquidator in a voluntary winding up must distribute the assets to the creditors, and I take it that he must if he is winding up the concern, that everybody has a right to come in and be paid all or a part pro rata of whatever is due them. Now,

this statute is inconsistent with that. And that is one of the most persuasive things if you have to go outside the particular clause in question for an interpretation to sustain a finding, that this means just what it says, and that is that the distribution that is provided for in here, namely, is confined to those who are there in the jurisdiction, and the other people from the outside pick up their payment wherever they can get it, if they are fortunate enough to get it. So I am going to rule, and it will save the argument to say it here, that the liquidators were not universal liquidators. I have reached that conclusion a long time ago."

The Court (continuing): I will continue along that line for a minute: Not being universal liquidators as I look at them, it makes no difference what powers they might have in event they were universal liquidators. That is to say, whether a universal liquidator would have the power, as far as it might be conferred by the Straits Settlements law, to go out into another jurisdiction and take in assets, I will assume that he would have that; but the question here is: What would these liquidators have in the way of power under this statute? So I do not think that they were vested with the right, as distinguished from the vesting of title to property, that they were not vested with the right nor did they have the authority from the Straits Settlements to go anywhere and collect any assets outside the jurisdiction of the Straits Settlements of the Governor in Council.

Mr. Stanley: Then I understand, your Honor, that as far as the liquidators standing here as liquidators is concerned, that is disposed of, and that they cannot sue here.

The Court: No, because I still have not decided what the result of the peace treaty was. I have not passed upon the question of whether the custodian out there is not a stockholder.

379 Mr. Stanley: Oh, well, I am laying that aside.

The Court: Leaving that aside, if their right of action as claimed rested upon the provisions of the winding-up ordinance, I should say that the liquidators have no standing here.

Mr. Stanley: You will pardon me if I just pursue my point a little further, because I want to get perfectly clear on the

record what the situation is so I will understand it. Your Honor's ruling I understand now is, that if these vesting orders had not been entered as they were entered I think in November, 1926, and if this resolution that was passed since the case began had not been passed, that the liquidators would have no right to prosecute this suit which has been brought on behalf of Behn, Meyer & Company, Limited, by them in this court?

The Court: That would be my finding.

Mr. Stanley contended on behalf of the defendants in both cases that Behn, Meyer & Company, Ltd., is an alien enemy under the Trading with the Enemy Act, that the burden is on the plaintiff in each suit to prove that it is not an enemy and that they have not done so, that at the time of the seizure the corporate entity had been wiped out and the property in substance was being held for the benefit of the stockholders, that it was at that time substantially a partnership, that the property was seized as property of the component parts, that Behn, Meyer & Company, Ltd., was simply an agency of Arnold Otto Meyer, that Arnold Otto Meyer, a partnership, was the substance and Behn, Meyer & Company was not a real corporation, that in like cases the Straits Settlements would not return the property to American claimants, that Section 9 (c) of the Trading with the Enemy Act is constitutional, that a corporation is a citizen or subject within the meaning of that act.

380 At this point the Court stated:

“I am going to hold that corporations are included.”

Mr. Stanley continued his argument by contending that the action of the German directors in holding meetings authorizing the bringing of Equity No. 40361 were contrary to the provisions of the Treaty of Versailles and that the vesting orders under which Equity No. 45881 had been ratified were confiscatory and penal and would not be enforced in the United States.

At this point the Court stated:

“It would be a confiscation by Germany, but I will suppose that when Germany agrees to take care of its own nationals we are bound to assume that she meant what

she said and will do what she said. Of course, we do not know anything about German law, or at least I do not, but I have an idea gained from some source that the nationals of Germany may in some way proceed against Germany much more liberally than we know anything about in this country. So that it seems to me in fairness to Germany we are bound to assume that she will keep her obligations, and that there will be some way of enforcing that obligation.

* * * * *

“It is just the same as I see it as what followed the Spanish American war. I do not see any difference.”

Mr. Gordon continuing the argument for the plaintiff in Equity 45881 contended that Behn, Meyer & Company was a corporation for all purposes and not an agency of Arnold Otto Meyer.

Mr. Doing continuing the argument for the plaintiff in Equity 45881 contended that the Treaty of Versailles was not confiscatory but was a taking by Germany and the transfer by Germany to Great Britain, that actual registration of the custodian as a shareholder in the stock registry book was unnecessary in order for him to control the pending litigation.

381 The Court announced the following rulings:

“I do not think the Treaty of Commerce and Navigation affects the provisions of the Treaty (of Versailles) so far as we are concerned.

“I shall have to be bound by the decision in this case of the Supreme Court in that matter (in reference to enemy stockholders) and so it makes no difference that all the stock was owned by German stockholders because it does not appear that Arnold Otto Meyer was the whole thing in the understanding of the corporation.

“I believe that the reciprocity part of our Alien Property Act does not apply.

“I do not believe that the fiction that says that the stock of a corporation has the situs of the domicile of the corporation can be used to overcome the provisions of that section (the section of the Treaty of Versailles whereby the allied and associated powers reserve the right to retain and

liquidate all property, rights and interests belonging at the date of the coming into force of the treaty to German nationals or companies controlled by them within their territories, colonies, possessions and protectorates). Right there I decided in your favor (in favor of the plaintiff in Equity 40361) so far as concerns the treaty, and this legal proposition about the assets being at the domicile of the corporation I shall find as a matter of law that unless there be some other reason there is absolutely no control possible to be put into operation by a Straits Settlements corporation of property of German nationals, of German corporations, which was actually as a matter of fact situated within the territory of the United States or its possessions.

382 The Court announced its decision as follows:

Opinion.

The Court (Mr. Chief Justice McCoy): I have already indicated two or three findings. One was a finding of fact on the Straits Settlements law as related to the question of whether or not the liquidators are acting as universal trustees or receivers or liquidators. I do not need to say anything more about that.

I have already passed upon the question of whether or not there was any shell of a corporation that was really concealing German nationals all the time. As I understand it now, there was not any such thing. I think I am bound by the decision of the Supreme Court in this very case to say, even though it were the fact that every stockholder in Behn, Meyer & Company were now and always had been a German national, that that would not make any difference, because that does not present a case for going behind the corporate entity, as they do in some cases.

I have already said that I think the treaty of peace was not meant to deal with fictions so far as the locus, or situs, of corporate property is concerned, but I was dealing with the fact. The fact was that this property was within the United States, or in one of its possessions, and therefore that the Straits Settlements could not by this fiction of law claim that this property was in the Straits Settlements; that is, so far as the treaty provisions, at any rate, are concerned.

I found on reading the treaty last night that there was this provision, to the effect that enemy property in the territory of the Allied and Associated Powers should
383 be possessed by them; and I found also a provision that Germany undertook that its nationals should hand over certificates of stock which they held in a corporation of an enemy country—Great Britain, for instance.

Mr. Kresel: Your Honor will recall, Mr. Mundell testified that that provision had no application here, because that was confined to the six months period after the signing of the treaty and referred only to stock certificates in Germany. These were not in Germany.

Mr. Doing: It shows the intent of the treaty. That is the point.

The Court: I am just speaking about the treaty itself. Now, in some way or other, which I do not know but which on reading that provision I assumed was by virtue of the treaty, the German stockholders had turned over their certificates of stock and it was possessed down there in the Straits Settlements by the liquidator, I take it, with perhaps a right in the custodian to have it. Nevertheless, we find that the then registered stockholders have them. Now, how did they get them? As I said the other day, I cannot find on Mr. Mundell's testimony that the custodian either returned those certificates or consented to their return, but they were down there and apparently out of the hands of the stockholders. And I think it is fair to assume, if it is not actually proved as a fact, that they were in the hands of the liquidators, and they got back and are now in the hands of the people who held these meetings and authorized this suit to be brought. I believe it is admitted that the
384 custodian might lawfully, with the advice and consent, so to speak, of the Governor in Council, return these certificates. That is, I so suppose, because under the orders in council which were adopted by the King he might do it. He said that these things might be relieved from the charge thereunder, and we will assume that the Straits Settlements had the right to do the same thing. At any rate, they claimed that right, and they have to by virtue of the fact that they claim the power to do anything in this connection, though as I read the orders in council it

seemed to me rather doubtful on the whole whether they had any powers in the premises at all.

However, this stock is back in the hands of these people who authorized the suit, in which Mr. Kresel and Mr. Harshkopf appear as attorneys, and it seems to me that they are the stockholders at present. I cannot see anything else in it, because I am bound to say that those certificates went back lawfully. To assume otherwise would assume some action of a criminal nature on the part of some official of the Straits Settlements.

I do not know that I go along entirely with Mr. Kresel's argument that the Government of the United States by not having taken any Congressional action to charge this property is therefore letting it go back to the German nationals as a matter of favor. The situation seems to be that the Government has just kept its hands off, and therefore that the property is to go back to Behn, Meyer & Company. And it seems to me, so far as the maintenance of these two actions is concerned that, we will say, the German Behn, Meyer & Company has established its right to bring the action and in that action to have a decree.

I do not want to stir up any further litigation, but I would assume that the Alien Property Custodian
385 would make a check—if eventually I am sustained—to the order of Behn, Meyer & Company, and I would assume that in this particular matter it would be turned over to those people who, under whatever action is taken by these present stockholders as I look upon them, are the duly constituted officers of Behn, Meyer & Company. It may be that then it would become a matter for some diplomatic representations on the part of Great Britain.

If I have assumed anything as a fact which is not admittedly a fact I should like to be corrected on that now, but on what you may or may not be pleased to call my reasoning, logically or legally or however you may look at it, those are my conclusions; and it will follow as a matter of law that the liquidator's action will be dismissed and that the German stockholders' action will go to a decree in favor of Behn, Meyer & Company.

Mr. Doing: If your Honor please may I ask that if the case is to turn upon the effect of these certificates being in

the hands of these Germans that I have leave to reopen the case to prove how they came to so hold. There is no evidence in this case as to how they came by them. The papers show nothing. I submit that the case should not go off on the merits in that way without some evidence upon the subject at first hand in the case. It is not fair to anybody concerned, I am sure.

Mr. Kresel: This is a late day, your Honor, to speak of the fairness of this matter. I have kept my temper under great temptation to speak my mind in reference to
386 these liquidators, particularly Mr. Clarke, who, I have believed, knew just how these stock certificates had been handed over to us, that he consented to it, that the consent is in writing, and that when I spoke to Mr. Clarke in this court room he denied knowing anything about it. And yet, according to the letter which I showed your Honor a copy of and which I undertook to produce the original of, when he was on his way over here for the trial of this case he knew all about the return, because he sent a telegram to Mr. Overbeck demanding the return of the certificates.

As I say, it is too late now to ask to reopen the case to prove what the facts are. The facts are as Mr. Mundell said, before he had a change of heart, that these stock certificates were returned to us by the liquidator, and that he thought it was done with the knowledge and consent of the custodian. Then he came back and said, "While it is true that that is what I think, I want you to know that I am not saying it upon my own knowledge; I was told so." I think that is sufficient.

The Court then stated:

I cannot at this time at any rate entertain any such motion. I do not want to suggest any further litigation before me on this case, but if such a motion is to be made it should be made on affidavits. Settle your decree on notice.

387 This argument was completed and the decision of the Court was announced Saturday, February 26, 1927, as aforesaid.

Thereafter, the decrees not having been presented to the Court, the plaintiff in Equity 45881 on November 1, 1927,

filed a motion to reopen the case to allow the taking of further testimony. This was objected to by the plaintiff in Equity 40361 and by the defendants in both cases and argument thereon was had November 17, 1927. By order dated December 16, 1927, the Court overruled said motion.

Thereafter January 25, 1928, counsel appeared before Chief Justice McCoy to present the final decrees in said causes, and the following proceedings were had:

Mr. Bradley: In the course of the trial, after Sir Thomas Chitty, who was a witness for the complainants in Equity No. 40361, had testified and left the country, Mr. Mundell, who was a witness for the complainants in the other equity cause, and who had completed his direct testimony, was recalled and gave further direct testimony with the understanding and agreement on Mr. Gordon's part that a written statement might be obtained from Sir Thomas Chitty, this written statement to contain what Sir Thomas would have testified to if he had been present in court, and the written statement to have the same effect as though Sir Thomas had been present and testified in court. We have that written statement of Sir Thomas, which we wish to submit to the court.

Mr. Gordon: The plaintiff in Equity 45881 objects to the admission in evidence of the certificate of Sir Thomas Chitty for the following reasons:

The first point in his opinion does not deal with the law of the Straits Settlements but relates to the law of evidence which is governed by the laws of the District of Columbia and is not subject to expert opinion by Sir Thomas. The second point in his opinion does not deal with the laws of the Straits Settlements but deals with the law of the United States. Whether or not the British Empire may interfere with what Sir Thomas calls a right reserved to the United States certainly is not a question of Straits Settlements law.

Mr. Stanley: I would like to note my objection. I have never been quite clear as to how the Government stood on this arrangement with Sir Thomas Chitty as to giving his testimony after he left. I was not a party to that arrangement. It is perfectly true I sat silent and said nothing, but I was not examining the witness at the time. But I object to it on the same ground that I objected to most of

the testimony in the case, namely, that neither of the complainants are properly before the court. That is, they have not a right to sue for this stock. I think I made that clear. I do not think it is necessary to encumber the record with a further statement.

The Court: Your contention is that no matter what Sir Thomas Chitty says, these complainants haven't any standing?

Mr. Stanley: Yes, that is right.

The Court: I will overrule all the objections, and let it go in.

Mr. Stanley: We may have an exception?

The Court: And both sides except to that. Mr. Gordon's client excepts. The complainant in what case is that, Mr. Gordon?

Mr. Gordon: Equity No. 45881.

The Court: And the Alien Property Custodian, the defendant in both cases.

389 Mr. Stanley: Yes.

The Court: The record here made will show the circumstances under which it goes in.

The statement of Sir T. Willis Chitty above referred to was as follows:

To the Honorable Walter I. McCoy, Chief Justice:

I am advised that upon the trial of the above causes, and in relation to the direct examination of Howell Dawson Mundell, Esq., as an expert witness in behalf of the Straits Settlements liquidators, there were introduced in evidence on January 31, 1927, after my departure from the United States, three documents (Liquidators' Exhibits 24, 25 and 26) made by the Straits Settlements Governor in Council on November 13, 1926, purporting to vest in the Straits Settlements Custodian of Enemy Property the shares of stock of Behn, Meyer & Co., Ltd., standing upon the register in the names of Ed. L. Lorenz-Meyer, F. H. Witthoefft and Ad. Laspe, and that said action was taken in alleged pursuance of the Clearing Office Ordinance, 1920, of the Straits Settlements.

In my opinion, the said alleged vesting orders are ineffective so far as the property now in the hands of the

United States of America in the above causes is concerned, for the following reasons:

(1) I am advised that the said certificates of stock above referred to and the stock register and stock certificate books of Behn, Meyer & Co., Ltd., were and remained in the possession of the Straits Settlements liquidators of the trade of Behn, Meyer & Co., Ltd., in the Colony until the early part of 1925, when, as the said Mundell testified, the said certificates and books were turned by the liquidators over to a representative of the said Messrs. 390 Lorenz-Meyer, Witthoeft and Laspe for delivery to them in Germany.

In my opinion, in the absence of evidence to the contrary, that action must be presumed to have been regularly and properly taken; and, therefore, in the absence of evidence to the contrary it must be presumed that said certificates and books, and the interests which they represent, were duly released from the charge dealt with in said ordinance. Hence the vesting orders are ineffective, for there is no authority of law for taking steps to charge or to vest property of German nationals after it has once been released.

(2) Neither the said Clearing Office Ordinance, nor the King's Order in Council on which it is based, can, in my opinion, do more than Parliament authorized, that is carry out and effectuate the charge created in the Treaty of Versailles, the apposite portions of which constitute part of the said ordinance and order in council. It is, therefore, necessary to determine what the said Treaty of Versailles authorizes.

Turning to the said treaty, it will be found that article 297 (b) provides that "the Allied and Associated Powers reserve the right to retain and liquidate all property, rights, and interests belonging at the date of the coming into force of the present treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates". Hence, under this clause, the right to retain and liquidate the property involved in the present suits was reserved to the United States; where the said property was located.

It was so reserved to the United States as property within its territory which belonged to a company controlled

by German nationals. Being thus reserved to the
391 United States, it was, in my opinion, withdrawn entirely from the other Allied and Associated Powers, including the British Empire. In my opinion, it follows from that that neither the British Empire, nor any other Allied or Associated Power, may in any manner, direct or indirect, interfere with this right reserved to the United States.

Hence, it is my opinion that, neither by attempting to vest in the Straits Settlements Custodian of Enemy Property shares of stock in such a British corporation as Behn, Meyer & Co., Ltd., nor by any other means, can the British Empire have or secure any right, title or interest in the property of that company in the United States, or any power, agency or control thereover.

It follows, further, in my opinion, that the said property being reserved exclusively to United States as aforesaid, if that nation does not see fit to avail of its treaty rights thereover, no other Allied or Associated Power can, by any means whatever, take advantage thereof; and that, in such case, the United States may relinquish its rights in this private property to the persons from whom it would have taken it otherwise, namely, the German nationals in control of the said company.

All of which is respectfully submitted to the Court, this 23rd day of September, 1927.

(Sgd.)

T. WILLES CHITTY.

The Court: Now was there some other point?

Mr. Bradley: Yes, your Honor. Heretofore also during the course of the trial Mr. Kresel, on behalf of complainant in Equity No. 40361 offered in evidence a copy of a letter dated December 7, 1926, from C. V. Bailey to H. Overbeck. This document was marked "Behn, Meyer & Company Exhibit No. 1 for identification." At the
392 time Mr. Kresel offered this copy he said that he would later produce and file the original and substitute it for the copy. So we submit the original of this letter now to the Court.

The Court: Was that admitted or excluded?

Mr. Stanley: Excluded.

Mr. Gordon: The plaintiff in Equity 45881 objects to the introduction in evidence of Behn, Meyer & Company's Exhibit 1 for the same reasons that were interposed at the time that the copy of that letter was offered in evidence. If there is any admission contained in the letter it is not binding on the Custodian, who is the present holder of the stock of the company. The letter is fragmentary and is not admissible standing alone. The letter refers to other matters which are not before the Court. The letter was not produced at the time of the trial so that the plaintiff in Equity 45881 had no opportunity to meet the statements contained therein. The paper itself refers to certain information which the writer thinks that he got from certain correspondence and obviously the correspondence ought to be produced so that the Court would know whether or not he was right in his conclusions. For these reasons the Court excluded the copy of the letter. Nothing has been done to make the copy now offered any more admissible than the copy originally offered. In addition to this there has been no proof of the authenticity of the signatures on the document now offered to Court. For these reasons we object to its admission.

The Court: I will have to exclude the original of the copy which was referred to here for the reasons which I gave at the time.

Mr. Bradley: May we note an exception?

393 The Court: Yes. And of course it still is open to the objection that the signature of Mr. Bailey is not proven. The letter offered and excluded will be marked Behn, Meyer & Company Exhibit 1-A for identification. And that will be a part of this record and not, of course, of the other.

The letter referred to was as follows:

7th December, 1926.

H. Overbeck, Esq.,

N. V. Behn, Meyer Handels Maatschappij,
Batavia.

DEAR MR. OVERBECK:

With reference to the cable which Mr. Clarke sent to you at Manila, requesting you to return the Register of Mem-

bers and Directors and Share Certificates taken by you on the 14th February 1925, I wish to assure you that the word "taken by you" were not intended in any offensive manner. The telegram was despatched the day on which Mr. Clarke got married, and a few hours only before his departure for America, and he was really too rushed to be able to choose his words carefully. The cable intended to refer to the documents delivered to you, to which action I find, from correspondence in our office, the Custodian of Enemy Property in Singapore agreed.

I shall be glad to hear from you that this removes any misunderstanding which may have existed.

Yours sincerely,

C. V. BAILEY.

Mr. Gordon: In order to complete our record the plaintiff in Equity 45881 asks that an exception be noted to the order of Court recently entered, overruling the motion to reopen these cases to allow the taking of further testimony.

394 The Court: I do not think you need it. Possibly

I am mistaken, so you may take an exception. It is a matter of the strict record, and that does not call for an exception.

Mr. Gordon: Then we will present the decrees.

(After some discussion of one of the decrees the following stipulation was dictated by the Court:)

The Court: It is stipulated that if the plaintiff in Equity 40361 is entitled to the money in Trusts Nos. 50219, 50235, 50236, and 50238, then it is also entitled to a portion of the earnings thereon accrued in the Treasury of the United States in the amount of \$50,788.43, minus lawful expenses in the amount of \$677.17, or a total of \$50,111.26.

Mr. Stanley: I agree to that.

Mr. Bradley: I agree to that.

The decrees in both cases were then signed by the Court.

395 Be it further remembered that the foregoing contains the substance of all the evidence given at the hearing of this cause, except such parts as are not essential to the decision of the appeal, and in order that the same

may be made of record this statement of evidence is duly stated, approved, signed and ordered to be made of record in the above-entitled cause this 28th day of March, 1928.

By the Court.

WALTER I. McCOY,
Chief Justice.

We approve the foregoing statement of evidence.

HOWE, HILL & BRADLEY,
Attorneys for Plaintiff in Equity 40361.
COVINGTON, BURLING & RUBLEE,
Attorneys for Plaintiff in Equity 45881.
DEAN HILL STANLEY,
Attorney for Defendants in Both Cases.

Endorsed on cover: District of Columbia Supreme Court. No. 4760. Howard Sutherland, &c., et al., appellants, vs. Behn, Meyer & Company, Limited. Court of Appeals, District of Columbia. Filed May 2, 1928. Henry W. Hodges, Clerk.

